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IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1551

WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW, and ARTHUR A. BOGEAUS, Co-Partners, d/b/a SOUTHEASTERN INDUSTRIAL DEVELOPMENT DISTRICT,

Petitioners,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Respondent,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

Supreme Court of the United States

October Term, 1976

WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW, AND ARTHUR A. BOGEAUS, CO-PARTNERS, D/B/A SOUTHEASTERN INDUSTRIAL DEVELOPMENT DISTRICT,

Petitioners,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Respondent,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petitioner requests a writ of certiorari be issued to review the decision of the United States Court of Claims in this case.

The decision resulted from a rehearing and reversal of the original panel and was entered on January 28, 1976.

Opinion Below

The trial court opinion establishing an award, was entered on the 23rd day of January 1974 (See Appendix A).

The trial court award was affirmed and entered on the 28th day of June 1974 (See Appendix B).

The subsequent decision of the original 3 judge panel of the Court of Claims as to the claim of the mortgagee to the award

was entered on the 14th day of May 1975 (See Appendix C). The question was first raised at that level.

The decision granting the motion for rehearing was entered the 27th day of June 1975 and is set forth at Appendix D.

The decision of the full court after rehearing as to lack of authority to award attorney's fees was entered October 24, 1975 (See Appendix E).

The decision of the full panel of the rehearing as to the mortgagee's claim to the award was entered January 28, 1976 (See Appendix F).

An earlier decision in a condemnation action involving the same premises and parties and is referred to in the opinions of the Court of Claims. This is attached at Appendix G. *(United States v. Certain Space,* 320 F.S. 491 affirmed *per curiam* 435 F (2) 872, Certiorari denied 402 U.S. 908).

Jurisdiction

The rehearing opinion of the United States Court of Claims was entered on January 28, 1976.

The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

Questions Presented

I.

Does Title 28 U. S. C. 1491, limiting jurisdiction in the United States Court of Claims to only those "claims founded upon the Constitution, an act of Congress, any regulation of an executive department, upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases sounding in tort," confer jurisdiction to declare rights under a private real property mortgage agreement to which the United States was not a party, which

declaration is a prerequisite to enforcing an alleged mortgagee's claim against a private party entitled to funds from the United States.

II.

Under Title 28 U.S.C. Section 1491 of the United States Code does the Court of Claims have jurisdiction to protect the lien or interest of an attorney in the proceeds of a Court of Claims decision produced by the attorney's efforts?

III.

Should the United States Court of Claims have abstained from declaring rights between private parties to private instruments, involving questions of local real property law, in favor submission of such question to a State Court.

IV.

Is the real property mortgage instrument relied on by the mortgagee presently valid and effectual against SID or is it barred by the New York State statute of limitations and/or otherwise discharged under New York law?

V.

Was the United States Court of Claims action and procedure in this case otherwise proper and correct?

Statutory Provisions

TITLE 28 U.S.C. Section 1491

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any

regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority.

JUDICIARY LAW OF NEW YORK STATE SEC. 475

§ 475. Attorney's lien in action, special or other proceeding

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report,

determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien. L.1909, c. 35; amended L.1936, c. 876; L.1938, c. 34; L.1946, c. 105, eff. Sept. 1, 1946.

NEW YORK STATE CIVIL PRACTICE LAW AND RULES

§ 213. Actions to be commenced within six years: where not otherwise provided for; on contract; on sealed instrument; on bond or note, and mortgage upon real property; by state based on misappropriation of public property; based on mistake; to establish a will; by corporation against director, officer or stockholder; based on fraud

The following actions must be commenced within six years:

4. an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein;

NEW YORK STATE CIVIL PRACTICE LAW AND RULES

§ 304. Method of commencing action or special proceeding

An action is commenced and jurisdiction acquired by service of a summons. A special proceeding is commenced and jurisdiction acquired by service of a notice of petition or order to show cause.

L.1962, c. 308, eff. Sept. 1, 1963.

Statement

SID the petitioner herein is an Illinois co-partnership. It was the owner of a lease with the United States of America of a downtown Syracuse, New York office building known as the Chimes Building.

Equitable was mortgagee under two agreements with SID, one in 1954, and the other in 1966 (Appendices H, I). On January 1, 1967 the mortgage principal all came due by the terms of the mortgage (Appendix I). In October, 1967 SID conveyed the building to City Investing Company by a deed in lieu of foreclosure.

City Investing as well as subsequent owners substantially altered the SID bond and mortgage without SID's consent. The due date was extended, interest was increased, and part of the mortgaged premises was released (Appendices K, L, M, N).

The lease between SID and the United States expired according to its terms on December 31, 1966 at which time, pursuant to the lease, the United States was obligated to pay SID cash in lieu of restoration of the premises to their original condition, normal wear and tear excepted.

The United States initially offered $4,600.00± but later increased the amount to $7,000.00± (See Appendix A, Page 32a).

SID refused this offer and in 1968 filed a claim for restoration monies against the United States in the United States Court of Claims.

SID tried the suit alone. After trial, SID was awarded $292,574.26 by the trial division (Appendix A) which was affirmed on appeal to a 3 judge panel of the Court of Claims on the 23rd day of January, 1974 (Appendix B). No motion for rehearing was made nor was any application for Certiorari made and that decision has now become final.

Both the trial and appellate courts found that SID was the owner of the lease and entitled to the monies due from the United States (Appendices A, C & F).

The issue on this appeal does not involve the existence of the award but involves who owns the award.

This issue arises because Equitable Life Assurance Society of the United States filed a claim in 1971 to such an award as SID might receive on the grounds that it was a real property mortgagee to whom the award if any had been assigned pursuant to Paragraph 20 of the mortgage instrument. (Appendix H, page 116a)

This claim of Equitable had been asserted in 1971 and was held in abeyance until the main action was completed.

The validity of Equitable's claim was challenged by SID on the grounds set forth hereinafter at Point II of Reasons for granting the writ.

The Court of Claim's original panel then assumed jurisdiction of the claim of Equitable but dismissed it after construing the mortgage instrument not to emcompass monies due for restoration and holding that the mortgage was in any event discharged as a matter of law.

Rehearing *en banc* was moved for, granted and held.

The rehearing panel with two of the original panel absent and with one dissent by a member of the original panel who stated that the original panel adhered to its original position, construed the mortgage instrument to be presently valid and gave the entire award to Equitable and directed counsel to turn the judgment papers necessary to effectuate the award over to Equitable (Appendix F).

In the course of the above proceedings both the original parel (Appendix C) and the rehearing panel (Appendix F) for

a short span of time directed the attorneys to meet and negotiate payment of attorneys' fees of counsel which Equitable represented to the court it was willing to pay. The court however expressly ruled it lacked jurisdiction to entertain such claims (Appendix E).

After the rehearing a similar decision was issued. Pursuant to that decision discussions between counsel were still in progress when, without notice to either counsel, the court suddenly issued the final rehearing decision announcing therein that it had delayed its rehearing decision what it then announced had been a reasonable time (Appendix F, Pages 72a-73a). However, the Court's determination of what was a reasonable time was neither set forth in its prior order nor communicated to counsel who, at that time, were still conferring.

The United States took no position in the lower court as to the outcome of the proceedings involving the mortgagee claim or the attorney's fee claim or other claims. SID had transferred the premises in 1967 and was no longer the owner of the premises but in its transfer had reserved in writing any right title of interest in and to any monies due from the United States on account of the restoration claim (Appendix J).

SID had requested that in the event the court were to make an award to Equitable that the subsequent owners be brought into the action by virtue of this so that equity could be done and SID could receive the award directly.

This was not honored by the rehearing panel and so all the parties involved were not before the lower court.

In order to achieve the results reached by the rehearing panel there had to first be a construction of a private document, *i.e.* the mortgage between private parties not involving the United States as a prerequisite to the final action of the court.

Such a prior construction involves the court in complicated questions of local real property law requiring local expertise.

A comparison of the two opinions below clearly indicates the potential for error in such a process.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

Jurisdiction

The United States Court of Claim's assumption of jurisdiction of a private mortgage claim against a private party based on a mortgage instrument between private parties which must be construed in order to confer standing is flatly at variance with this courts holding in *United States v. Sherwood*, 312 US 584, 61 S. Ct. 767, where this court held:

> [3,4] Except as Congress has consented there is no jurisdiction
>
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> in the Court of Claims more than in any other court to entertain suits against the United States, or for the review of its decisions by appellate courts. Luckenbach Steamship Co. v. United States, 272 U.S. 533, 536, 47 S. Ct. 186, 187, 71 L.Ed. 394, et seq. For that reason it has been uniformly held, upon a review of the statutes creating the court and defining its authority, that its jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States, United States v. Alire, 6 Wall. 573, 18 L.Ed. 947; United States v. Jones, 131 U.S. 1, 9 S. Ct. 669, 33 L.Ed. 90, and if the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court. United States v. Jones, supra; Lynn v. United States, 5 Cir., 110 F.2d 586, 588; Leather & Leigh

v. United States, 61 Ct.Cl. 388, or if its maintenance against private parties is prerequisite to prosecution of the suit against the United States the suit must be dismissed. Jackson v. United States, 27 Ct.Cl. 74, 84; Wait v. United States, 57 Ct.Cl. 546; Leather & Leigh v. United States, supra; cf. Turner's Case, Turner v. Creek Nation of Indians, 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291; Green v. Menominee Tribe, 233 U.S. 558, 34 S.Ct. 706, 58 L.Ed. 1093. See Pacific Mutual Life Insurance Co. v. United States, Ct. Cl., 44 F.2d 887, 888.

[5,6] We think it plain that the present suit could not have been maintained in the Court of Claims because that court is without jurisdiction of any suit brought against private parties and because adjudication of the right or capacity of respondent to proceed with the suit upon the contract of the judgment debtor with the United States is prerequisite to any recovery upon the Government contract. As the court below recognized, the judgment debtor, who is made a necessary party by § 795 of the Civil Practice Act, in any suit brought pursuant to the order of the state court is entitled to attack the validity of the order and of the judgment on which it

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is founded. See Nankivel v. Omsk All Russian Government, 237 N.Y. 150, 158, 142 N.E. 569. Adjudication of that issue is not within the jurisdiction of the Court of Claims whose authority, as we have seen, is narrowly restricted to the adjudication of suits brought against the Government alone.

As indicated by the above quote the court's assumption of jurisdiction is also at variance with earlier decisions of the Court of Claims itself (See cases collected in *United States v. Sherwood, supra,* at page 587 of the official report) and with decisions of that court which followed, *United States v. Sherwood, supra,* (*Berkley v. United States,* 276 F 2d 9).

This court held in *United States v. King,* 395 US 1, 89 S. Ct. 1501, that such a conflict between the decisions of this Court and the Court of Claims is sufficient grounds for *Certiorari.*[1]

[1] A suggestion of absence of jurisdiction may be made at any stage, *American Fire and Casualty Company v. Finn,* 341 US 6 at 542; *Peoples Bank*

(Footnote continued on following page)

Furthermore, under *Sherwood,* the court lacks jurisdiction over all the necessary parties to fully determine the rights involved. The court ignored counsel's requests to join the current owners who will eventually benefit from the award. For Equitable must apply the funds to the balance due on the mortgage debt, to the benefit of the current owners who are not a party to this action. Such a result violates a written agreement between SID and its grantee to the effect that SID alone was entitled to the award (Appendix J). In addition this result provides the current owners with a windfall, and leaves SID with nothing.

Considering the limited nature of the court of claim's jurisdiction the court should have abstained from any ruling on the rights of third parties. The court should have deferred to New York courts to resolve the remaining issues. *Thompson v. Magnolia Petroleum Company,* 309 U. S. 478.

In this case the Court of Claims twice held it had no jurisdiction over attorney's liens and claims (Appendices E and F, Pages 51a-52a, 72a-73a).

An attorney has a following lien under Sec. 475 of the New York Judiciary Law, *supra. Schoenherr v. Van Meter,* 215 N.Y. 548. The attorney's lien or at least a *quantum meruit* action exists.[2]

(Footnote continued from preceding page)

v. Calhoun, 102 US 256; *Woodward v. D. H. Overmyer Company,* 428 Fed. 2nd 800 Cert. Denied, 400 US 993, CA 2nd; Wright on Federal Courts, Sec. 7 (1970); *United States v. Storer Broadcasting Co.,* 351 US 193, 197; *Gutieriez v. Waterman S.S. Co.,* 373 US 206, 209; *Federal Communications Commission v. National Broadcasting Co.,* 319 US 239, 246; *Rochester Telephone Corp. v. United States,* 307 US 125, 128, n.3; *A.F.L. v. Labor Board,* 308 US 401, 403. Petitioner did suggest the inconsistency in the Courts entertainment of a mortgage lien and the exclusion of an attorneys lien and did move to dismiss Equitable from any claim.

[2] *Moorstein v. Excelsior Insurance Company of Syracuse,* 25 N.Y. 2d 651, 653; *Stathos v. Murphy,* 26 AD 2d 500 aff'd 19 NY 2d 883; *McGowan v. Parish,* 237 U.S. 285.

If jurisdiction be found for the mortgage claim, the attorney's claim should have been received, and if no jurisdiction exists for an attorney's claim it is difficult to see how one could exist for the mortgage claim.

II.

The rehearing panel's reversal of the original panel is at variance with other decisions of that court and the law of New York.

At Appendix F, Page 70a the rehearing panel without citation to any New York authority held as follows:

> SID argues further that when Equitable executed the extension agreement of July 30, 1968, with the then owners of the property without the consent of SID, the agreement had the effect of releasing SID from any obligation with respect to the debt and mortgage in favor of Equitable. We do not agree. SID was never liable personally on the bond or mortgage in favor of Equitable. By this argument, SID attempts to invoke the principle that when a creditor extends the date of payment of a note without the consent of the surety or the person secondarily liable, the surety or the person secondarily liable is discharged from all liability on the note. The defect in this argument is that SID was never personally liable directly or secondarily to Equitable on the note. Consequently, when Equitable entered into the extension agreement of July 30, 1968, with the then owners of the property, it had no effect whatever on Equitable's right to claim the restoration award under Clause 20 of its 1954 consolidated mortgage.

SID has been declared the owner of $292,542 ± due from the United States.

The lower court took this money from SID and gave it to Equitable to apply on the mortgage debt.

This action surely imposes a loss upon SID, and reflects a liability upon the monies, owned by SID, giving rise to

equitable rights of subrogation in SID *(Matter of Lafayette National Bank of Brooklyn*, 254 AD 207).

The mere fact that the mortgage instrument precludes further and additional liability does not change the fact that private funds owned by SID are totally lost by the rehearing panel's decision [3] (Appendix H, Page 101a).

This is clearly a form of liability and the original panel was correct.

When such a distinction is recognized, the New York law of discharge by alteration without consent applies.[4] In fact there were four modification agreements over several years (Appendices K, L, M & N), all without SID's consent and all altered materially the terms of the mortgage (See Statement *supra).*

New York laws provide that an original mortgagor is discharged when binding agreements that materially alter the mortgage terms are made with third parties without the consent of the original party. This discharge is necessary because the modification agreement impaired SID's subrogation rights in the mortgage. The law recognizes it is unfair to force SID into an agreement or to suffer the effects of an agreement it did not make. *Paine v. Jones,* 76 N.Y. 274, *Murray v. Marshall,* 94 N.Y. 611, *Becker v. Faber,* 280 N.Y. 146, 38 N.Y. Jurisprudence Secs. 183-86; *Union Life Insurance Company v. Hanford,* 143 US 187, 190; *Equitable Surety Company v. United States,* 234 US 448, 457.

As stated before there is no question but that a right of subrogation in SID exists. *Matter of Lafayette National Bank of Brooklyn,* 254 AD 207.

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[3] A security instrument should be strictly construed in favor of the debtor. *Gillit v. Bank of America,* 160 N.Y. 549; *Alland v. Consumers Credit Corp.,* 476 F 2d 951; *Leben v. Nassau Savings & Loan Assoc.,* 40 AD 2d 830

[4] New York law applies, *Bank of America National Trust & Savings Association v. Parnell,* 352 US 29, 33; See also *United States v. Little Lake Misere Land Company, Inc.,* 412 US 590, 593-94.

These principles apply whether the grantee takes subject to the mortgage or whether he is liable for a deficiency. *Spencer v. Spencer,* 95 N.Y. 353.

In order to avoid the question of discharge the lower court found no debt due from SID to Equitable, but in so doing it came into conflict with its own earlier decisions holding a debt is necessary to the enforcement of a security instrument. *Beaconwear Clothing Co. v. United States,* 174 Ct. Cl. 40, 355 F 2d 583; *United Pacific Insurance Co. v. U. S.,* 175 Ct. Cl. 118.

The lower court decision in this case is thus at variance with its own earlier decisions, and also with New York law *(Waring v. Smith,* 2 Barb. Chan. 119, 135; *Merritt v. Bartholick,* 36 N.Y. 9, 38 N.Y. Jurisprudence Secs. 1, 51. Such cases hold that mortgage assignments to creditors are conditional on an existing debtor/creditor relationship.

The original panel was correct on these 2 points and its decision should be reinstated (Appendix C, Page 46a).

The rehearing panel also committed patent error when it ignored the New York six year statute of limitations on enforcement of rights under mortgages, because any New York action against SID is now barred by its statute of limitations. New York State CPLR Section 213.[5]

SID defaulted in January, 1966, and no New York action on the mortgage was commenced within six years.

The rehearing panel determination that Equitable had a present right to the moneys is also at variance with the New York case of *Matter of Lafayette National Bank of Brooklyn,* 254 AD 207, holding that when a party has foreclosed on one part of the security *i.e.* the real estate, other security rights

[5] Laches should bar Equitable's claim. Equitable delayed 8 years in the enforcement of any claim on the principal due from SID. Also Equitable was disinterested in this proceeding when recovery was problematical. *Penn Mutual Life Insurance Company v. City of Austin,* 168 U.S. 685, 696.

such as condemnation awards are suspended until the outcome of the foreclosure action. There is a foreclosure action pending here (See summons at Appendix O).

Conclusion

For reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Claims on the grounds of conflict with acts of Congress, prior decisions of this court, and the Court of Claims, and laws of the State of New York.

Respectfully submitted,

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Appendix A. Trial Court opinion determining an award for SEID entered January 23, 1974

IN THE UNITED STATES COURT OF CLAIMS
TRIAL DIVISION

No. 379-68

(Filed January 23, 1974)

WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW, AND ARTHUR A. BOGEAUS, CO-PARTNERS, D/B/A SOUTHEASTERN INDUSTRIAL DEVELOPMENT DISTRICT

v.

THE UNITED STATES

(THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES
*Plaintiff-Inventor**)

REPORT OF TRIAL JUDGE TO THE COURT**

John B. Carroll, attorney of record for plaintiffs. Carroll & Carroll, of counsel.

Herbert Pittle, with whom was Assistant Attorney General Wallace H. Johnson, for defendant.

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* Action on petitioner's motion to dismiss intervenor's claim suspended Oct. 1, 1971, until 30 days after decision on the merits. Intervenor did not appear nor present any evidence at trial.

** The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

Appendix A. Trial Court opinion determining an award for SEID entered January 23, 1974.

OPINION.

SPECTOR, *Trial Judge:* This action arises out of the lease by defendant of a large office building in Syracuse, New York, for a period of 20 years, from December 3, 1946, to December 31, 1966. Known as the Chimes Building, it was the home of various federal agencies during that period, including the Veterans Administration, Armed Forces Examination and Induction Station, Internal Revenue Service and others.

The case specifically involves the restoration clause in the lease which gives the Government the right to make alterations, attach fixtures and erect additions and structures upon the premises, and gives the lessor the corresponding right to require the Government to "restore the premises to the same condition as that existing at the time of entering upon the same under this lease, reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control, excepted * * *." An amendment to the lease permitted cash settlement by mutual agreement, in lieu of actual physical restoration by the Government. The parties were unable to agree upon a cash settlement.

Under the terms of the lease, the Government was responsible for operation and maintenance,[1] and the lessor was to pay for taxes, insurance and structural repairs. At the time of the negotiation and execution of the lease with the Government in 1946, the Chimes Building had served as a general multi-tenancy office building with commercial stores on the

[1] Except for one redecoration by the lessor with the exercise of each 5-year renewal option by the lessee.

Appendix A. Trial Court opinion determining an award for SEID entered January 23, 1974.

first floor. It had been well maintained and its condition at that time was described by expert witnesses, without contradiction, as being very good to excellent. It was then one of the three leading office buildings in Syracuse, the others being the State Tower Building and the Syracuse Kemper Building. All had been built at about the same time, just prior to the 1929 crash and depression. The Chimes Building was of good construction, and it was then occupied for the most part by doctors, dentists, lawyers, insurance agents, brokerage houses and the like.

Occupancy by the Government tenant agencies was followed by extensive demolition and removal of corridors, walls and partitions which had theretofore defined the pre-existing, multi-tenant general office space. This was to provide the large open spaces preferred by the Government, and to permit installation of equipment serving the Government's special uses. Other areas were altered into small highly compartmented interviewing cubicles by means of half-partitions. Existing incandescent electric light fixtures were removed and replaced with about 900 large fluorescent fixtures suspended from the ceiling. They are not suitable for multi-tenant commercial offices, such as had pre-existed.

The general condition of the building about 6 months after the Government entered upon the lease, is described in a condition survey report of July 24 and 25, 1947, prepared by Government personnel. For the purposes of this opinion, and by reason of facts stated in the findings, it is deemed to be a joint condition report as of that time, and also as of the date of execution of the lease, some 8 months earlier. The report is in part irrelevant since it, in large part, describes the exterior of the building, and features of the interior as to which plaintiffs have made no claim under the restoration clause. There

are relevant references to occasional plug holes, telephone holes and cracks in terrazzo floors, occasional cracks in marbel wainscot, and occasional plaster defects, door defects, and malfunction of lavatory equipment. It is reasonable to conclude, as defendant urges, that in excess of 900 holes existed in the terrazzo floors when the Government took possession.

But in addition to the fact that the alterations earlier described were not rectified, the general condition of the interior of the Chimes Building was substantially worse at the expiration of the lease than shown on the July 1947 report. This deterioration in the condition of the interior was not for the most part the result of reasonable and ordinary wear and tear. Qualified witnesses with first hand knowledge of the comparative condition of the interior in 1946-47 and 1966-67 testified as to these facts, and fortified their testimony with some 85 photographic exhibits portraying conditions after the Government vacated the premises. They relied on floor plans in 1946-47, the aforementioned condition survey report of July 1947, and direct personal knowledge to compare the pre-existing condition with the condition they surveyed at the expiration of the lease.

These witnesses described how the extensive alterations to corridors, walls and partitions, and the damage observed, rendered the building unrentable for general commercial office space in 1967. The expert wintesses of both parties testified that an excellent market existed for such space in Syracuse at that time.

In brief summary, at least two of the solid bronze elevator doors had been permitted to get out of adjustment resulting in irreparable damage. There was broken marble in the lobby,

the obvious result of negligence rather than lack of maintenance. The terrazzo floor in the lobby had been marred beyond repair at some points. Retaining braces and rails were missing in the elevators, and the woodwork on the interior of the elevator cabs was scarred and indented as if struck by heavy material being transported. Floors in elevators were damaged, and had been permitted to deteriorate beyond repair.

These witnesses confirmed damage to walls, floors and plumbing throughout the building, and testified that the 85 photographs were typical of conditions they observed. A fully qualified witness testified that the reasonable cost in 1966 of restoring the premises to the same condition as that existing at the time of entering upon the lease, with appropriate allowance for pre-existing condition, and with appropriate allowance for reasonable and ordinary wear and tear, would be $585,148.52.

As one of two alternative defenses,[2] the defendant similarly offered witnesses as to the reasonable cost of restoration, with the same allowances for reasonable and ordinary wear and tear. Defendant's witnesses adhered in their testimony to a nominal settlement offer made following the expiration of the lease in the amount of $4,530, later increased to $6,955. The evidence of record on the reasonable cost of restoration under the terms of the lease, is overwhelmingly to the contrary. It indicates that this nominal offer was predicated upon a legal conclusion, namely, that the lessee had little or no obligation for restoration under the terms of the lease. For example, the offer makes no allowance for the extensive alteration of corridors, walls and partitions, by far the largest single item in plaintiffs' restoration claim.

[2] Discussed by counsel at trial, tr. 25.

One of defendant's witnesses on cost of restoration was the building manager from 1962 to 1967. He was not familiar with the condition of the building in 1946 when the Government entered upon the premises. He was not aware of any change in condition in the 5-year period he was there. He acknowledged that some partitions were moved during that period, and that the plaintiffs' photographic exhibits accurately described the condition of the elevators.

Defendant's negotiator in the unsuccessful effort to settle the cost of restoration was not intimately familiar with the building. He testified he was not "in a position to have an opinion" on the reasonableness of the Government's proposed figure, stating: "All I have to rely on is information fed to me." The figures he conveyed to plaintiffs were furnished him by a Mr. Losordo in the New York regional office who testified he had never visited the Chimes Building.

Mr. Losordo, in turn, based his estimate of the cost of restoration on a description of items supplied to him, and that description did not mention the major item of the restoration of corridors, walls and partitions to accommodate multi-tenant occupancy as the building was being utilized at the inception of the lease. The estimator had not seen the 1947 plans, and did not in his testimony consider himself qualified to express an opinion on the cost of restoration without inspecting the building. The final witness on cost of restoration was concerned principally with the elevators. He had visited the Chimes Building "probably no more than twice."

In summary, the evidence offered in rebuttal of plaintiffs' submissions on the alterations to the interior, comparative condition (1946-47 and 1966-67), and the reasonable cost of

restoration to 1946-47 condition under the terms of the lease, is incomplete, not first hand, and therefore not entitled to great weight.

Plaintiffs' offers in settlement during these negotiations were admitted over plaintiffs' objections that they were incomplete and irrelevant. In objecting, counsel pointed out that when made, the Government had just vacated the premises, but had taken a continuing lease of some of the floors by condemnation, rendering the remaining floors unrentable. Any offers made, it is urged, were under circumstances when plaintiffs were trying to save the building from foreclosure, and do not possess the relevance of the proof and sworn testimony offered at trial. These offers of settlement in the amount of $99,136 (incomplete), and $164,141 have been weighed with all the evidence of record, with greater weight given to that developed at trial, under oath.

A preponderance of the evidence supports the estimate of the cost of restoration (in accordance with the terms of the lease) testified to by plaintiffs' witnesses, provided however that it is adjusted downward in certain particulars. Plaintiffs' principal witness on the fair and reasonable cost of restoration to the condition existing at the time defendant entered upon the premises, testified that he had made appropriate allowances for pre-existing conditions based on the 1947 condition survey report; and the 1947 plans of the building showing its layout at that time. He also testified that he had made an appropriate allowance for reasonable and ordinary wear and tear during the term of the lease. His estimates and testimony are not rebutted by credible testimony or other evidence of record. As concluded above, witnesses offered in rebuttal lacked first hand knowledge of

the condition of the building at the inception of the lease or at its expiration, for comparison purposes. The data on which they relied were patently incomplete, and large elements such as restoration of corridors and partitioning were erroneously excluded from consideration, presumably in the belief that they were not covered by the restoration clause.

It is nevertheless concluded that plaintiffs' restoration estimate should be reduced to reflect probable under-allowances for pre-existent conditions, similar under-allowances for ordinary wear and tear, and the fact that some deterioration probably occurred following the expiration of the lease and during and after the partial occupancy by defendant under condemnation. Taking these factors into consideration, and in the absence of better evidence, it is concluded, in the nature of a "jury" verdict, that plaintiffs' estimate of the cost of restoration should be reduced by 30 percent.

In addition, restoration of corridors and plaster partitioning, restoration of suitable lighting fixtures for multi-tenant occupancy, and repair of the various elements of damage reflected in plaintiffs' proof, would in all probability result in some degree of betterment over the pre-existing condition of the premises. Although, for example, the replacement on a used car of a damaged fender with a new fender does not result in a "betterment" to the owner, it would appear in this instance that the replacement and repair of some items with their present-day equivalent, would unavoidably result in some betterment to the interior of the building. On this account, and also in the nature of a jury verdict, it is concluded that plaintiffs' proof on the cost of restoration should be further reduced by 20 percent.

This 50 percent reduction in plaintiffs' figure of $585,148.52 results in a finding of $292,574.26 as the fair and reasonable cost of restoring the interior of the Chimes Building to the same condition as that existing at the time the defendant entered upon the same under its lease, reasonable and ordinary wear and tear excepted.

The second of the Government's alternative defenses is that restoration of the Chimes Building "to the same condition as that existing at the time" it entered upon the lease, excepting reasonable and ordinary wear and tear, would not have increased the market value of the building anyway. Hence, defendant urges, it is not liable for any restoration nor for a cash settlement in lieu of actual restoration. This argument is nothing more nor less than a corollary of that unimpeachable rule of law to the effect that damages must in fact be suffered to be recoverable. It has no application to the facts in this case.

Expert witnesses qualified and presented by both parties testified that the highest and best use of the Chimes Building, both in 1946 when the Government entered upon the lease, and in 1966 when it vacated the premises, was as a general, commercial office building. Both testified and stated in their appraisals that there was a strong demand for office space in downtown Syracuse at the expiration of this lease and that comparable buildings earlier mentioned were fully rented. Defendant's expert witness further stated in his appraisal report that:

> * * * As of 1966 the Government had redivided the property to the point where the sections occupied by the Veterans Administration on the third, eighth, and ninth floors and the space occupied by the Armed Forces Examination and Induction Station on the eleventh had

been so subdivided that their rental value is decreased to anyone except the rare firm which would need extreme compartmentalization. * * *

In spite of this, defendant's witness concluded that the fair market value of the building as of January 1, 1967, was the same whether or not it was restored to the same condition as that existing at the time of entering upon the lease in 1946, namely, $1,500,000. This conclusion is contrary to the evidence of record, the testimony of other experts, and is not deemed credible.

The evidence shows that the Chimes Building's highest and best use was as a general, commercial office building; that there was an excellent market for such space at the expiration of this lease; and that the building was virtually unrentable as a general, commercial office building unless and until it was restored to that highest and best use. Therefore, the conclusion that the market value of the building would not be increased at all by such restoration, is not entitled to credit.

Plaintiffs' appraisal witness was much more familiar with the building, and was otherwise highly qualified as an appraiser and real estate broker. He expressed the opinion that the estimate of $585,148.52 to restore the building was very fair. His appraisal of fair market value as of December 31, 1966, was $2,190,400. With the expenditure of $600,000 to restore the property to its condition prior to the lease, he was of the opinion that the fair market value would be increased to about $3 million.

It is obvious that if the premises were restored to the same condition as that existing at the time defendant entered upon them (reasonable and ordinary wear and tear and damage by the elements or by circumstances over which the Government

had no control, except), and market value of the Chimes Building as of December 31, 1966, would be increased by an amount not only equal to, but well in excess of, the investment in restoration.

The cases cited by defendant bear no resemblance to this case. *Eaddy* v. *United States*[3] involved a lease of unimproved land. The lease contained no restoration clause. The court implied one, and held defendant liable for the diminution in the value of plaintiff's land. *Spitzel* v. *United States*[4] also involved a lease of unimproved land, and a holding that plaintiff was entitled to the diminution in market value of the damaged land, that being less than the cost of restoration. *Dodge Street Bldg. Corp.* v. *United States*[5] involved partial restoration of three floors of plaintiff's building, formerly used as a hotel, and leased to defendant for office space. The Government was not obligated under the lease to restore those floors to hotel space. The evidence in that case showed that the fair market value of the unrestored premises was, in fact, greater than its market value would have been had it been restored. In such case the lessor had obviously sustained no damage, and it was so held.

In *Realty Associates, Inc.* v. *United States,*[6] the Government had leased a textile mill property between 1943 and 1947. During that period the Government had spent $558,000 modernizing and improving the property which had theretofore been standing idle for almost 10 years. Rather than being damaged by reason of the Government's oc-

[3] 134 Ct. Cl. 338 (1956).

[4] 146 Ct. Cl. 399 (1959).

[5] 169 Ct. Cl. 496, 341 F.2d 641 (1965).

[6] 134 Ct. Cl. 167, 170-71 (1956).

cupancy and improvements, the property had become so valuable at the expiration of the lease that it was 100 percent rented and produced gross income of $150,000 per annum. It would, in the court's words, have been "a financial tragedy for plaintiff if the premises were actually restored to their 1943 condition. * * * In the light of the entire record it is difficult to believe that plaintiff in good faith wanted any of the items restored."[7]

In short, the cases cited by defendant support rather than detract from plaintiffs' claim under the restoration clause.[8]

[7] It is noteworthy that with these findings illustrating overall enhancement of the property by reason of the Government's alterations, partial judgment was nevertheless entered for plaintiff to cover some items found to require restoration.

[8] Plaintiffs also rely on a fairly recent decision of the highest court of the State of New York, *Farrell Lines, Inc.* v. *City of New York*, 30 N.Y.2d 76-85, 281 N.E.2d 162, 330 N.Y.S. 2d 358-64 (1972), as follows:

"It is well established that when an action is brought by a landlord for breach of a covenant to keep in good repair after the expiration of the lease, the cost of accomplishing what should have been done measures the lessor's damages. [Citing cases.] * * *

"Farrell, however, contends that this rule is inapplicable. Specifically, it claims that the City waives its right to recover damages for breach of the covenant for the reason that subsequent to the termination of the lease, the City entered into a lease with Northeast providing for the demolition of the pier, and the construction of a container ship terminal. In short, Farrell contends 'the repairs would have been of no value, and consequently the City suffered no loss for which it should be indemnified.'

"Similar contentions have been urged before other courts, and they have been uniformly rejected, the courts holding that the lessee's liability is unaffected by such circumstances. [Citing authorities.] In our opinion, this view is sound, and should be adhered to. Not only does it give recognition to the fact that as a result of the lessee's failure to repair, the lessor may have had a narrower market for his property (Rawlings v. Morgan, 114

(Footnote continued on following page)

It is concluded that plaintiffs are entitled to recover in the sum of $292,574.26.

FINDINGS OF FACT

1. Plaintiffs are four individuals d/b/a Southeastern Industrial Development District (SEID), a partnership formed under the laws of Illinois.

2. At all times pertinent to the resolution of this case, plaintiffs were owners and lessors of the Chimes Building, a large office building located at West Onondaga and South Salina Streets in downtown Syracuse, New York. The Chimes Building is a 12-story full basement office structure with two penthouses above the 12th floor. The first floor is divided into an entrance lobby and commercial store areas. The second through 12th floors are divided into general office space.

3. By lease dated December 3, 1946, as amended by supplemental agreements Nos. 1, 2 and 3, the United States leased the total rentable office space in the Chimes Building (in excess of 123,774 square feet) from the Onondaga Holding Corporation (plaintiffs' predecessor in interest) at an annual rental of approximately $250,000. The Government lease was negotiated for 5 years, with three 5-year renewal options. It

(Footnote continued from preceding page)

Eng. Com. Law R. 776), but also to the fact that lessors generally will link the amount of rental charged with such covenants of repair. Indeed, to hold that a lessor waives his right to collect what the repairs would have cost because subsequent to the execution of the lease he causes the premises to be demolished would be unfair to the lessor who, in return for such covenants, charges a rental that is far less than he could have received. Consequently, the trial court correctly held that the City's conduct with respect to the pier did not abridge or take away its cause of action."

provided that the Government was to pay all operating and maintenance expenses, and the lessor was to pay taxes, insurance, structural repairs, and the costs of redecoration once during each 5-year lease term.

4. The renewal options were exercised and by mutual agreement the expiration date for the entire building was established as December 31, 1966.

5. This case revolves specifically about the terms of paragraph 8 of the lease, which provides in pertinent part as follows:

> 8. The Government shall have the right, during the existence of this lease, to make alterations, attach fixtures, and erect additions, structures, or signs, in or upon the premises hereby leased (provided such alterations, additions, structures, or signs shall not be detrimental to or inconsistent with the rights granted to other tenants on the property or in the building in which said premises are located); which fixtures, additions, or structures so placed in or upon or attached to the said premises shall be and remain the property of the Government and may be removed therefrom by the Government prior to the termination of this lease, *and the Government, if required by the Lessor, shall before the expiration of these lease or renewal thereof, restore the premises to the same condition as that existing at the time of entering upon the same under this lease, reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control, excepted:* Provided, however, that if the Lessor requires such restoration, the Lessor shall give written notice thereof to the Government one hundred eighty days before the termination of the lease. [Emphasis supplied.]

6. The parties to the lease agreed by exchange of communications to a revision of this restoration provision permitting cash settlement by mutual agreement, in lieu of actual restoration by the Government. Prior to the expiration of the lease, notice was duly given by plaintiffs "that the Lessors require the restoration of the premises in accordance with the terms and provisions of the existing lease, but that the Lessors elect that the Government shall make a cash settlement with the Lessor for the cost of such restoration providing the Government agrees." This dispute originates out of a failure of the parties to agree upon a cash settlement.

7. The Chimes Building was built by the Hubb City Realty Corporation in 1928 at a reported cost of $1,420,000. The property was acquired by the City Investing Company of New York City on July 5, 1946, in the name of the Onondaga Holding Corporation. Subsequently, this corporation purchased contiguous parcels forming the present site. On or about December 26, 1947, the Onondaga Holding Corporation assigned the lease to the Equitable Life Assurance Society of the United States, the then holder of a first mortgage on the leased premises. By deed dated February 29, 1952, the Onondaga Holding Corporation conveyed the premises to plaintiffs d/b/a the Southeastern Industrial Development District for an indicated consideration of $3 million. On March 4, 1954 the Equitable Life Assurance Society of the United States assigned the lease to plaintiffs.

8. At the time of the negotiation of the Government lease in 1946, the Chimes Building was a general, multi-tenancy office building with commercial stores off the lobby on the first floor. It had been well maintained and its condition, during such occupancy, was described by expert witnesses, without contradiction, as very good to excellent. It was one of the

three leading office buildings in Syracuse at that time, the other two being the State Tower Building and the Syracuse Kemper Building. All three had been built at approximately the same time, just prior to the 1929 crash and depression. In 1946 occupants of the Chimes Building were for the most part doctors, dentists, lawyers, insurance agents, brokerage houses and the like.

9. Occupancy of the building by the Government, principally the Veterans Administration, Internal Revenue Service, Armed Forces Examination and Induction Station, and other tenant-agencies, resulted in extensive demolition and removal of corridors and partitions which had served to define the pre-existing multi-tenant office space. This was to provide the Government with large open spaces, and to permit installation of equipment meeting the Government's special requirements. Other areas of the building were more highly compartmented into smaller than average interviewing cubicles, by means of metal and glass half-partitions. Incandescent electric light fixtures were removed, and replaced with large suspended fluorescent fixtures, not suitable for average size multi-tenant offices.

10. The general condition of the building about 6 months after the Government entered upon the lease, is described in a condition survey report reflecting an inspection on July 24th and 25th, 1947, by Edward J. Holahan and C. P. Wicks. The report was transmitted by letter of January 29, 1948, from the Federal Works Agency, Public Buildings Administration in New York to the District Manager of PBA in Syracuse. The transmittal letter recites that E. J. Hugenin had been handed a copy of the report by the author "on one of my trips to Syracuse with the understanding that he would arrange to have it checked." Each page of the report is initialed E.J.H.

In offering the report, Government counsel suggests that these initials are those of E. J. Hugenin, and Government counsel further advises that at the time Hugenin represented the owners or their agent, Eagan Real Estate, Inc. The transmittal letter continues:

> You will recall that we submitted a listing of major defects prior to assuming operations and that all items in the report were taken care of by the owner. It is not our intention to *require* the owner to correct all conditions outlined in the attached survey, but it was submitted to Hugenin with the recommendation that the owner make the repairs in his own interest. In any event, the report will become a part of the lease file, and will be utilized at such time as restoration comes up.

11. The Mr. Holahan mentioned in the condition survey report represented the Government on the occasion of the July 24-25, 1947, inspection; and Mr. Wicks is mentioned therein as "Building Superintendent for the owner." Mr. Wicks had become a Government employee by the time the Government took over the building operation. All of the above considered, there is a sufficient basis for treating the condition survey report as a joint report, rather than one solely the product of Government representatives. There is also a sufficient basis for concluding that the conditions reflected in the report as of July 24-25, 1947, existed, for the most part, on the date of execution of the lease some 8 months earlier on December 3, 1946.

12. The report is partially irrelevant since it in large part deals with the exterior condition of the building and with other features of the interior of the building as to which plaintiffs have made no claim for restoration costs. Summarizing the relevant aspects of the report, there are referen-

ces to occasional plug holes, telephone holes, and cracks in terrazzo floors, occasional cracks in marble wainscot, plaster defects, door defects and malfunction of lavatory equipment. It is reasonable to conclude, as the defendant urges, that in excess of 900 holes existed in the terrazzo floors when the Government took possession of the building.

13. Defendant acknowledges that the existing lighting fixtures throughout the building, for the most part incandescent-type, were replaced with approximately 900 suspended fluorescent fixtures. These were not commercially feasible for normal multi-tenant office space in 1966 when the lease expired. It is undisputed that extensive alterations were made to the building by the Government at its expense and with its own forces, as well as by the lessor acting on behalf of the Government at the Government's expense.

14. The condition of the Chimes Building at the expiration of the lease was described by various witnesses, and portrayed in a number of photographic exhibits. The latter, 85 in number, portray conditions following the expiration of the lease at various locations in the Chimes Building. The pictures demonstrate damages beyond what one could justifiably regard as "reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control * * *."

15. Plaintiffs' first witness on these damages was Thomas E. Shaughnessy, a property manager for Eagan Real Estate, Inc., the largest real estate company in the area. He was then managing the MONY Building, Syracuse Kemper Building. Shoppingtown, Fairmount Fair and seven other shopping centers, and the Industrial Park (nine large buildings leased to General Electric Company and eight other large tenants) and a large number of other buildings in the Syracuse area. Mr.

Shaughnessy is also President of Standard Syracuse Corporation, a construction company which performs various types of small construction jobs such as alterations, store fronts, and repair and replacement of fire losses.

16. Mr. Shaughnessy managed the Chimes Building for the various owners from 1935 to 1966. He stated that in December 1966 there was a strong demand for multi-tenant general office space in Syracuse; that the comparable Syracuse Kemper Building was 95-98 percent rented at that time; and that the Chimes Building could have been similarly rented if corridors, walls and similar items suitable for multi-tenants had been restored. He was familiar with the condition of the building from the end of the lease in 1966 through 1969, and testified that it would have been difficult to interest any prospective tenant in leasing space in this building at all, considering the condition it was in. In his opinion, had it been "put back in a condition similar to what it was in 1947, it would be in excellent rental condition and easy to rent, and at the going market price."

17. In the entrance lobby, this witness observed that at least two of the solid bronze elevator doors had been permitted to get out of adjustment so that one door passing the other had scratched the bronze, materially detracting from its appearance to the point that replacement was required. He also observed broken marble in the lobby, particularly around the edges near elevator doors, apparently the result of negligence.

With the aid of the 85 photographic exhibits earlier mentioned, he testified to terrazzo facing in the lobby which was chipped and broken, presumably by being struck by a hand truck or other heavy object, and testified further that it had not been in that condition in 1947. Paint had been drop-

ped on the terrazzo, which was of a course absorptive texture and therefore difficult to clean. The terrazzo floor in the lobby was marred beyond repair at some points. The witness attributed this to improper maintenance, and negligence. He concluded that the conditions in the lobby to the building did not reflect normal wear and tear. Marble and terrazzo ordinarily require little care and simple maintenance, but must be protected from negligent damage.

18. Directing his attention to the elevators, Mr. Shaughnessy testified that rails and retaining braces were missing, woodwork badly scarred and indented from being struck by the edges of heavy material being transported, a hole 2 feet square had been cut in the floor of one elevator, the floor of another showed complete deterioration from rot and the terrazzo floor in another had deteriorated beyond repair. He concluded that these conditions did not reflect ordinary wear and tear, but rather indicated improper and inadequate maintenance.

19. The witness also testified that the damage to walls and floors throughout the building, as illustrated by the 85 photographs, was typical of what he observed; that the plumbing system had been allowed to deteriorate, causing water damage to plaster; that chrome on lavatory fixtures had not been polished nor maintained, resulting in corrosion requiring their replacement; and that incandescent lighting fixtures had been removed and not replaced.

20. Plaintiffs presented Eugene B. Irish on the reasonable cost of restoring the building. He is president of a construction company bearing his name, engaged in the construction of commercial, industrial, educational and office facilities in the greater metropolitan Syracuse area. The company also makes damage appraisals for all the major in-

surance adjusting firms in the area. Mr. Irish, in construction work for over 21 years, has been engaged regularly in the remodeling of office space.

21. Based on a comparative examination of the plans of the building in 1947, a conference with Mr. Shaughnessy concerning its condition at the inception of the lease, and visits to the building up to and including 1966, Mr. Irish conducted a floor by floor and room by room survey of the damage to the building. The survey was conducted during September and October 1969 and early 1970. He had been advised by Mr. Shaughnessy that the condition of the building was about the same in 1966. Mr. Irish had directed the taking of the photographs earlier mentioned. On the basis of that survey, he prepared the following estimate of repair, to return the building to its condition at the commencement of the lease:

Replace doors & door units complete		$ 44,500.74
Replace door hardwary		3,529.27
Door Unit removal		1,512.76
Closure of masonry door openings		5,457.90
Replacement of bath accessories		462.40
Replacement of hollow clay tile partitions plastered & painted both sides		141,079.63
Remove masonry partitions		13,425.00
Remove (Movable) partitions		7,721.24
Remove stud & stud and glass partitions		14,916.58
Remove wire mesh		136.50
Replacement of movable partitions	264,496.32	
Credit for reusable partition material	56,062.50	208,433.82
Plaster patching		13,448.33
Electrical removals		10,928.14
Electrical replacements		10,585.08

Terrazzo repairs, patches, grinding and sealing	26,800.21
Ceramic tile toilet repairs	1,068.63
Marble removals, relocations, replacement and repairs	15,543.66
Elevator cab replacement	23,522.40
Bronze elevator door replacement (1 pr.)	3,920.40
Plumbing removal & replacements	6,553.60
Replace resilient flooring	3,362.27
Replace cast bronze railing	3,267.00
Miscellaneous replacements	2,051.12
Miscellaneous removals	5,878.68
Sales Tax 5%	28,405.26
	596,510.62
Less 2% Sales Tax	-11,362.10
	$585,148.52

22. The above estimate reflects that the sales tax in 1966 was originally thought to be 5 percent, and was then corrected and lowered to 3 percent. It reflects the movement of a large quantity of removable metal partitions to re-establish the configurations for multi-tenancy rental existing in 1947. Other removable partitions had been trucked away and stored. The estimate reflects credit for reusable material, and it includes the cost of rebuilding plaster walls removed by the Government.

23. Mr. Irish found that there had been major changes by the Government in the pre-existing partitioning to meet Government needs. He also testified as to special equipment installed. His estimate reflects, *inter alia,* the cost of removal of a ventilating fan suspended from the ceiling in the medical area, the removal of an X-ray machine physically attached to both floor and ceiling, the removal of an 18 by 24 foot lab

table with appurtenances, removal of the lead shielding in the X-ray area, and repair of the wall in which it was installed.

24. The estimate includes the cost of replacement of the elevator cabs and one pair of bronze doors based on figures obtained from Otis Elevator, the repair of marble in the lobby which, it was determined, could still be matched; removal and replacement of electrical and plumbing work; repair of 14,090 holes in floors not previously repaired, caused by the driving of nails into the floor to secure wodden and metal partitions; replacement of missing hardware items; and the repair of plaster walls and ceilings. All figures were based on 1966 commodity prices. Mr. Irish's estimate, as adjusted, totals $585,148.52. The prior witness, Mr. Shaughnessy, had examined this estimate, and concurred in it.

25. Mr. Irish's estimate represents his opinion as to the fair and reasonable cost in 1966 of restoring the building to its condition at the inception of the lease, reasonable and ordinary wear and tear excepted.

26. Maurice S. Young was GSA Building Manager in the Chimes Building from 1962 to 1967. He had studied engineering, but did not possess an engineering degree. He supervised boilermen, firemen, guards, elevator operators and cleaning personnel. During his tenure the elevators were inspected and maintained under contracts with elevator maintenance companies which Mr. Young administered. He inspected the work of maintenance personnel and reported regularly to the area office in Buffalo. Any large repairs were done by contract.

27. In Mr. Young's opinion, the condition of the Chimes Building in 1962 when he was first assigned there "was not

materially much different from 1966/67 when he left." He was not familiar with the condition of the building in 1946 when the lease with the Government was executed nor when the Government entered upon the premises.

28. Mr. Young acknowledged that some partitions were moved at the request of tenant agencies during his tenure as building manager; that some maintenance was performed, but that no major repairs were performed except in the elevator cabs. He acknowledged that the aforementioned photographic exhibits were basically accurate in describing the condition of the elevator cabs.

29. Lewis F. Levy was Realty Officer, Region No. 2 of GSA, when this lease was about to expire in 1966, and was concerned with the decision to renegotiate for continued occupancy, or to alternatively relocate the tenant agencies. It was decided to permit the lease to expire, except for three floors as to which a temporary lease (until November 1967) was taken by condemnation.

30. Negotiations under the restoration clause were initiated by Mr. Levy's letters of June 30 and August 24, 1966. On November 2, 1966, plaintiffs submitted a survey report prepared by Eagan Real Estate as a "basis for negotiation." It was not offered as complete, nor as including "damage as may be occasioned by your moving from the premises." Dollar figures were provided opposite some items. They total $99,136.

31. The response to this was a breakdown from the Chief, Design Branch, Louis J. Losordo, recommending a total allowance of $4,530, and a communication from Mr. Levy to plaintiffs offering $4,555. In letter of February 28, 1968, Mr. Levy increased the offer to $6,955. In furtherance of

negotiations, a reinspection report was made dated May 8, 1968, with the aforementioned Mr. Shaughnessy and Mr. Levy present. It shows estimated costs of repair opposite most items, totaling $164,141. In a memorandum to file, Mr. Levy attaches a condition report prepared by him in some detail, without figures reflecting cost of restoration. In his memorandum he states that his report "reflects the condition of the Chimes Building as of May 8, 1968 and is not meant in any way to be a determination of responsibility for said conditions."

32. The admission of letters relating to settlement negotiations was objected to by plaintiffs' counsel on the ground of irrelevancy, since offers of settlement by plaintiffs were made under critical circumstances. The Government had vacated the premises but had taken a continuing lease of some of the floors by condemnation, rendering the remaining floors unrentable. Any offers made, it is urged, were under circumstances when plaintiffs were trying to save the building from foreclosure, and do not possess the relevance of proof and sworn testimony at trial.

33. Mr. Levy testified that he was not "in a position to have an opinion" on the reasonableness of the Government's counter-proposals. He stated: "All I have to rely on is information fed to me."

34. The aforementioned Louis J. Losordo, who furnished the information to Mr. Levy, testified he had never visited the Chimes Building. He based his estimate of the cost of restoration on a description of items supplied to him. That description did not, for example, mention the major item of the restoration of partitions and corridors for multi-tenant occupancy, so Mr. Losordo made no estimate thereon. He had not seen the 1947 plans of the building. He did not con-

sider himself qualified to express an opinion on the cost of restoration without inspecting the building.

35. Francis G. Bailey, a mechanical engineer employed by GSA, Region 2, had visited the Chimes Building occasionally "probably no more than twice," in the performance of his duties between 1952 and 1966. He inspected only the mechanical items on which Mr. Losordo's estimate is based. His testimony was directed principally to the condition of the elevators which he had inspected shortly prior to the vacating of the premises.

36. With respect to the plumbing escutcheons (wall plates) he expressed the opinion that the pitting observed resulted from ordinary wear and tear, not improper cleaning, but that less pitting would have occurred had there been greater ventilation in the toilet rooms. He similarly attributed most of the elevator damage to fair wear and tear. He acknowledged that the damage to the bronze doors earlier referred to resulted from their being operated while out of plumb. The photographic exhibits earlier mentioned demonstrated different conditions than he had observed, because they were taken after the building had been vacated.

37. It is a theory of defendant's case that restoration of the Chimes Building "to the same condition as that existing at the time of entering upon the same under this lease, reasonable and ordinary wear and tear and damage by the elements or by circumstances over which the Government has no control, excepted," would not have increased the market value of the building anyway. Hence it is urged that the Government was not liable for restoration, nor for a cash settlement in lieu of actual restoration.

38. On this issue defendant offered the testimony of Leslie B. Gray, an experienced real estate appraiser, and

licensed real estate salesman. He had attended Morrisville Agricultural and Technical Institute for 2 years, Cornell for 1 year, and had taken many courses in real estate appraising from the University College of Syracuse and the American Institute of Real Estate Appraisers. He had been a dairy farmer prior to 1956, but did appraisal work for banks and individuals on a part-time basis. After 1956 he performed appraisal work full time, including condemnation work for governmental agencies. From 1960 to 1964 he worked for the New York State Board of Equalization and Assessment, appraising commercial and industrial property. Since 1964 he has been associated with Pomeroy Appraisal Associates, Inc.

39. Mr. Gray has testified as an appraiser in state and federal court, and has made appraisals for large companies such as Sperry Rand, IBM, and Allied Chemical, and for agencies such as the New York Department of Transportation, State University of New York, GSA, Corps of Engineers, U. S. Department of Justice.

40. He first visited the Chimes Building in 1964 for the New York State Board of Equalization and Assessment, and for the GSA in 1967 in connection with this case. Mr. Gray concluded that the highest and best use of the Chimes Building, both in 1946 when the Government entered upon the lease, and in 1966 when it vacated the premises, was as a general office building. But he further concluded that the fair market value of the building as of January 1, 1967, was the same whether or not it was restored to the same condition as that existing at the time of entering upon the lease in 1946, namely, $1,500.000.

41. In reaching this conclusion Mr. Gray used the market data approach, that is, valuing a property by comparing it with sales of similar properties, making adjustments for dif-

ferences. He also used the income approach, that is, capitalizing the income that a property will earn. Mr. Gray acknowledged that in his written appraisal report he had stated:

> ***As of 1966 the Government had redivided the property to the point where the sections occupied by the Veterans Administration on the third, eighth, and ninth floors and the space occupied by the Armed Forces Examination and Induction Station on the eleventh had been so subdivided that their rental value is decreased to anyone except the rare firm which would need extreme compartmentalization.***

But he felt this diminution in rental value was offset by the fluorescent lighting fixtures installed and left by the Government (which plaintiffs offer as an additional item of damage requiring restoration).

42. Mr. Gray considered the condition of the lobby of the building to be the result of ordinary wear and tear, and made no allowance for it in his comparative appraisals. He reached the same conclusion with respect to the conditions in the hallways and interior space, viewing them as the result of ordinary wear and tear. He felt the same about the elevators, stating: "They were all operating when I inspected the building." The witness testified that the photographic exhibits introduced did not reflect the condition of the building as he had seen it somewhat earlier, and prior to continued occupancy of some floors under condemnation.

43. Mr. Gray would place the same market value on the Chimes Building, without regard to restoration of the premises, because "it would be ridiculous to restore it to the way it was in 1947." In reaching this conclusion, the witness

had concluded that the "building was in just as good condition as it was in 1947 taking into consideration normal wear and tear," except for obsolescence which one would not duplicate. Therefore, he concluded that the Government had no liability under the restoration clause.

44. Mr. Gray had also collaborated in an appraisal of the Chimes Building in connection with the condemnation of some three floors of leasehold space beyond January 1, 1967, for use by holdover Government tenant agencies. In both written appraisals it was concluded that:

> Investigation of the office building rental market indicates that there is a strong demand for first and second class office space in downtown Syracuse.***
>
> The Chimes Building is a general purpose office building located at the south end of the central business district with ample nearby parking avaliable. It has good functional utility and is adaptable to the demands of the office rental market.***

45. Mr. Gray's appraisal indicated that the Chimes Building, in order to be competitive, would require modern lighting fixtures, and he acknowledged that the suspended fluorescent fixtures installed and left by the Government would not be considered modern lighting. He further acknowledged that the Syracuse Kemper Building, of comparable age and condition, was fully rented as multi-tenant office space in 1967. The same was true of the State Tower Building, the other comparable office building in Syracuse.

46. It is concluded that the Chimes Building was not rentable at all under the conditions prevailing at the expiration of the lease in 1966. Restored to rentable condition, there would have been a strong demand for multi-tenant [illegible]ce in

the Chimes Building comparable to that which existed for the Kemper and State Tower Buildings in 1966.

47. Plaintiffs' expert witness on the issue of comparative market value of the Chimes Building in 1966, prior to and after restoration as required by the lease, was Bernard LaVine, real estate appraiser and licensed real estate broker. Mr. LaVine is a lifelong resident of Syracuse and real estate and appraisal has been his lifetime career. He has a B.S. in Business Administration, Syracuse University, 1941. His appraisals have included commercial and industrial properties and apartment houses for banks; California Oil Company, Esso, Tidewater and Mobil Oil Companies; the county, the city and the Syracuse Housing Authority; and for a large number of law firms. He has testified in various courts in New York State. He has built and sold new homes and remodeled homes, and has extensive financial experience with lending institutions.

48. Mr. LaVine prepared an appraisal report on the Chimes Building. He was very familiar with the building from a time prior to the execution of this lease in 1946, and had visited it a large number of times in the intervening period. He specifically inspected the building a number of times in late 1966 and early 1967 for appraisal purposes. He was familiar with the plans showing the layout of the building in 1946, and testified that they represented the interior of the building at that time.

49. The condition of the building was described as very good prior to 1947 when it was occupied by commercial tenants and operated as a general office building. Mr. LaVine testified that the aforementioned photographic exhibits fairly and accurately portrayed the condition of the premises in early 1967 when he conducted his appraisal.

50. He agreed with Mr. Gray that the market for commercial office space in Syracuse in 1967 was very good. Business was booming in Syracuse because of its strategic location, which attracted the regional offices of many national firms to the city. The configuration of the Chimes Building in 1947, readily adaptable to general multi-tenant offices of 300 to 2,000 square feet, would have been in demand if available to meet that economic growth. But the demolition of corridors, removal of partitions and installation of half partitions by the Government had converted it into a special use building, he testified. Mr. LaVine estimated that Mr. Irish's figure of $585,148.52 to restore the building was very fair. His appraisal report states that the interior condition of the building was poor, and further that:

> This interior condition showed the neglect and abuse of the interior by the Lessee, above the ordinary wear and use the subject property should have received during the period of the lease.
>
> As of December 31, 1966, the cost to renovate, repair, replace the flagrant neglect and abuse of the interior caused by the Lessee, is $596,510.12.
>
> This expenditure would restore the subject highrise office building to its condition to be competitive in the economic rental market.

51. It was Mr. LaVine's opinion that the fair market value of the property as of December 31, 1966, was $2,190,400. This figure is in line with the 1966 assessed valuation of $1,090,700 which, at the generally accepted equalization rate of 44 percent, would represent an appraisal of full value at $2,480,000. With the expenditure of $600,000 to restore the property to its condition prior to the lease, Mr. LaVine was of the opinion

that the fair market value would be increased to about $3 million.

ULTIMATE FINDINGS OF FACT

52. If the premises were restored to the same condition as that existing at the time defendant entered upon them, reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government had no control, excepted, the market value of the Chimes Building as of December 31, 1966, would be increased by an amount in excess of the cost of such restoration, or a cash settlement in lieu thereof.

53. The nominal offer of settlement in lieu of restoration by the defendant ($4,530, later $6,955) is unreasonable, and is not supported by the evidence.

54. A preponderance of the evidence supports the estimate of the cost of restoration (in accordance with the terms of the lease) testified to by plaintiffs' witnesses, provided however, that it is adjusted downward in a number of particulars as follows:

A. Plaintiffs' principal witness on the fair and reasonable cost of restoration to the condition existing at the time defendant entered upon the premises, testified that he made appropriate allowances for pre-existing conditions based on the joint 1947 inspection report; and the plans of the building as it was then laid out. He also testified that he had made an appropriate allowance for reasonable and ordinary wear and tear during the term of the lease. His estimates and testimony are not rebutted by credible testimony or other evidence of record. Witnesses offered in rebuttal lacked first hand knowledge of

the condition of the building at the inception of the lease or at its expiration, for comparison purposes. The data on which they relied were patently incomplete, and large elements such as restoration of corridors and partitioning were erroneously deemed not covered by the restoration clause and were excluded from consideration. It is nevertheless concluded that plaintiffs' restoration estimate should be reduced to reflect probable under-allowances for pre-existent conditions, ordinary wear and tear, and the fact that some deterioration probably occurred following the expiration of the lease and during and after the partial occupancy by defendant under condemnation. Taking these factors into consideration, and in the absence of better evidence, it is concluded, in the nature of a "jury" verdict, that plaintiffs' estimate of the cost of restoration should be reduced by 30 percent.

B. Restoration of corridors and plaster partitioning, of suitable lighting fixtures for multi-tenant occupancy, and repair of damage as reflected in plaintiffs' proof, would in all probability result in some degree of betterment in the pre-existing condition of the premises. Although, for example, the replacement on a used car of a damaged fender with a new fender does not result in a betterment, it would appear in this instance that the replacement and repair of some items with the modern equivalent of the items being replaced or repaired, would inevitably result in some betterment to the interior of the building. On this account, and also in the nature of a jury verdict, it is concluded that plaintiffs' proof on the cost of restoration should be further reduced by 20 percent.

55. A 50 percent reduction in plaintiffs' figure of $585,148.52 results in a finding of $292,574.26 as the fair and

Appendix A. Trial Court opinion determining an award for SEID entered January 23, 1974.

reasonable cost of restoring the interior of the Chimes Building to the same condition as that existing at the time the defendant entered upon the same under its lease, reasonable and ordinary wear and tear excepted.

CONCLUSION OF LAW

Upon the findings of fact and foregoing opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to recover of and from the United States and judgment is therefore entered for plaintiffs in the sum of two hundred ninety-two thousand, five hundred seventy-four dollars and twenty-six cents ($292,574.26).

Appendix B. Court of Claims affirmation of January 23, 1974 trial court decision entered June 28, 1974

IN THE UNITED STATES COURT OF CLAIMS

WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW AND ARTHUR A. BOGEAUS, Co-Partners, d/b/a SOUTHEASTERN INDUSTRIAL DEVELOPMENT DISTRICT,

v.

THE UNITED STATES;

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Plaintiff-Intervenor.

No. 379-68

Before: Davis, *Judge*, Presiding,
Laramore and Durfee, *Senior Judges*.

ORDER

This case comes before the court on the exceptions of the parties to the recommended decision, filed January 23, 1974, by Trial Judge Louis Spector pursuant to Rule 134(h), having been submitted to the court on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the trial judge's recommended decision, copies of which have been furnished to the parties, it hereby affirms and adopts the said recommended decision as the basis of its judgment in this case.

Appendix B. Court of Claims affirmation of January 23, 1974 trial court decision entered June 28, 1974.

IT IS THEREFORE ORDERED that plaintiffs are entitled to recover and judgment is entered for plaintiffs against defendant in the sum of $292,574.26.

BY THE COURT

OSCAR H. DAVIS,
Oscar H. Davis,
Judge, Presiding.

Jun 28 1974

Appendix C. Decision of original three judge panel of Court of Claims entered May 14, 1975, determining Equitable had no interest of SEID's award

IN THE UNITED STATES COURT OF CLAIMS

(Decided May 14, 1975)

WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW, AND ARTHUR A. BOGEAUS, Co-Partners, D/B/A SOUTHEASTERN INDUSTRIAL DEVELOPMENT DISTRICT,

Plaintiffs,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Plaintiff-Intervenor,

v.

THE UNITED STATES,

Defendant.

No. 379-68

John B. Carroll, attorney of record for plaintiffs. Carroll, Carroll & Butz, of counsel.

Hershel Shanks, attorney of record for plaintiff-intervenor. Michael S. Marcus, Philip J. Ufholz and Glassie, Pewett, Beebe & Shanks, of counsel.

Herbert Pittle, with whom was Assistant Attorney General Wallace H. Johnson, for defendant.

Before Cowen, *Chief Judge,* Durfee, *Senior Judge,* and Nichols, *Judge.*

Appendix C. Decision of original three judge panel of Court of Claims entered May 14, 1975, determining Equitable had no interest of SEID's award.

On Plaintiff-Intervenor's Motion and Plaintiffs' Cross Motion for Summary Judgment

Nichols, *Judge*, delivered the opinion of the court:

This suit was originally brought by Sampson and his partners, doing business as Southeastern Industrial Development District (SID), for $750,000 rehabilitation damages to premises owned by SID and leased to the United States from December 3, 1946 to December 31, 1966. There was a trial in October 1972 before Trial Judge Spector, in which plaintiff prevailed, and subsequently by order of the court of June 28, 1974, recovered judgment for $292,574.26. A dispute remains between plaintiff SID and its former mortgagee, Equitable Life Assurance Society of the United States (Equitable). Equitable had intervened in 1971 and plaintiff moved to dismiss the intervention. Action on this motion was deferred until after decision on the merits and we must now decide it. Both sides have now moved for summary judgment.

I

The starting place for stating the facts is the trial judge's opinion. The claim was on the usual tenant's covenant to restore the premises at the end of the tenancy to their condition at the beginning. The 1946 lease involved the general multi-story Chimes office building in the downtown area of Syracuse, New York. In 1946 the Chimes building was one of the three leading office buildings in Syracuse, having been built about 1928. Government occupancy led to "extensive demolition and removal of corridors, walls and partitions which had theretofore defined the pre-existing, multi-tenant general office space." "Other areas were altered into small highly compartmented interviewing cubicles by means of

Appendix C. Decision of original three judge panel of Court of Claims entered May 14, 1975, determining Equitable had no interest of SEID's award.

half-partitions. Existing incandescent electric light fixtures were removed and replaced with about 900 large fluorescent fixtures suspended from the ceiling. They are not suitable for multi-tenant commercial offices, such as had pre-existed."

In addition, the interior terrazzo floors, bronze elevator doors, marble and wood fixtures, all had been permanently and extensively damaged by the Goverment occupancy. Plaintiffs' experts testified to total restoration damages of $585,148.52 (excepting reasonable wear and tear). The trial judge by way of a "jury" verdict reduced the award claim 30% for other causes of the damage and 20% for "betterment" to the building involved in the necessary replacement of old irreparable fixtures by new ones. Thus the trial judge made the uncontested award of $292,574.26 over which plaintiffs and their former mortgagee now do battle.

The trial judge's finding 46 also stated: "It is concluded that the Chimes building was not rentable at all under the conditions prevailing at the expiration of the lease in 1966. Restored to rentable condition, there would have been a strong demand for multi-tenant space ***"

There was no appeal from the trial judge's findings and we affirmed without further comment by order on June 28, 1974, 204 Ct. Cl. 920.

II

The dispute between SID and Equitable is whether a 1954 mortgage made a valid assignment of these rehabilitation damages to Equitable. Clause 20 of the 1954 mortgage gives rise to Equitable's claim.

> 20. The party of the second part for themselves, their heirs, legal representatives, successors and assigns, does

hereby assign to said party of the first part, its heirs, legal representatives, successors and assigns any and all awards heretofore made and hereafter to be made to the present and all subsequent owners of the morgaged premises, including any award and awards for change of grade of any street affecting said mortgaged premises, and said party of the first part, its heirs, legal representatives, successors and assigns is hereby authorized and empowered to collect and receive such award and awards and to give proper receipts and acquittances therefor, and to apply the same toward the payment of the amount owing on said bond and mortgage, notwithstanding the fact that the amount owing on said bond and mortgage may not then be due and payable, and said party of the second part for themselves, their heirs, legal representatives, successors and assigns hereby covenants and agrees with said party of the first part, its heirs, legal representatives, successors and assigns upon request to make, execute and deliver any and all assignments and other instruments sufficient for the purpose of assigning said award and awards to the holder of said bond and mortgage, free, clear and discharged of any incumbrances of any kind or nature whatsoever.

SID and Equitable have engaged in previous litigation reported as *United States* v. *Certain Space,* 320 F. Supp. 491 (N.D.N.Y. 1969), *affd,* 435 F.2d 872 (1970), *cert. denied,* 402 U.S. 908 (1972). This was a condemnation the United States instituted to acquire the use of part of the premises in the Chimes building it had previously leased, for a further period, eventually ending November 30, 1967. The just compensation being uncontested as to amount, and part being on

deposit in the registry of the court, the above reported decision allocates it among the claimants, holding that City Investing Company (CIC) should take it all. Equitable claimed only in case SID received any of it, in that case invoking the above mentioned Clause 20. Since SID took nothing, neither did Equitable. The parties here did not even mention that decision, still less offer the record therein or any of it as evidence. We think some of the findings in that case, and documents reproduced and published therein, are relevant here, and we refer to them hereinafter as appears. Perhaps we should reopen the record to receive this material but we think our references are proper under established doctrines of judicial notice and collateral estoppel, especially since we are deciding under the summary judgment procedure.

Equitable was first mortgagee by a deed of trust dated April 1, 1954, which consolidated and replaced earlier agreements. There was a second mortgage to Irving Trust Co. and in 1966 both were in default. In March 1967 CIC became assignee of Irving Trust Co. and commenced a foreclosure in the state court, but in October 1967, CIC accepted SID's deed in lieu of foreclosure. CIC and SID agreed between themselves that the award for condemnation of the leasehold would belong to CIC and the damages, if any, recoverable on the restoration claim to SID. The defendant United States was aware of this agreement and undertook not to set it up as a defense under the Anti-Assignment Act, 31 U.S.C. § 203, which agreement has been honored. It is apparent that Equitable was aware of it also and that its acquiescense in the pocketing of the condemnation aware by CIC, notwithstanding Clause 20, reflected other measures taken by CIC to assure Equitable that its security was not impaired.

Appendix C. Decision of original three judge panel of Court of Claims entered May 14, 1975, determining Equitable had no interest of SEID's award.

The following facts are clear: A series of negotiations among SID, Equitable and CIC in 1967 resulted in a series of bargained agreements:

A. A September 14, 1967, letter from CIC to SID stated that the restoration and rehabilitation damages involved here "are reserved to you" (SID) and stated that they were not covered by the assignment of the rental condemnation damages to CIC.

B. SID provided CIC a deed to Chimes building which was recorded on October 17, 1967.

C. SID further assigned on October 2, 1967, the rental condemnation damages award ($178,700) to CIC.

The tradeoffs as reflected in *Certain Space* and the parties' motions and supporting documents were as follows:

Benefits to SID:

(1) $10,000 cash;

(2) sole retention of rights to rehabilitation damages (then mistakenly valued at about $7,000);

(3) sole retention of "loss of equity" damages claim (apparently worthless);

(4) it walked away from its losing investment in the Chimes building without personal liability;

Benefits to CIC and Equitable:

(1) title transfer without one-million-dollar state-foreclosure title-transfer tax;

(2) receipt of rental condemnation award damages ($178,700 cash);

(3) transfer of title to 2.2 million dollar building to second mortgagee—now new owner.

Appendix C. Decision of original three judge panel of Court of Claims entered May 14, 1975, determining Equitable had no interest of SEID's award.

These additional facts are also established:

(a) The July 30, 1968, novation of the 1954 mortgage (in which Investors Funding Corp. replaced SID and new borrowing terms and amounts were fixed by agreement with Equitable) discharged SID from all remaining obligations if any to Equitable, other than the Clause 20 in issue.

(b) The original 1954 mortgage agreement limited SID's liability to its interest in and value of the Chimes building.

(c) The disputed Clause 20 was construed as a "condemnation clause" by District Judge Port in denying SID any part of the condemnation award but "the rights or remedies of SID outside of the award, if any, remain undisturbed."

The District Judge did not specifically find Equitable's full involvement with CIC but we note that CIC was junior to Equitable (second mortgage is junior to first mortgage); that New York law requires and Equitable in fact was a party both to the foreclosure proceeding and to the condemnation proceeding; that in the condemnation proceedings Equitable patently waived its priority over CIC; and that in the transfer by deed from SID to CIC, Equitable also waived its rights to oppose the transfer under the mortgage by failure to object on time either in the foreclosure dismissal or condemnation proceeding decision.

III

Taken literally, Clause 20 would assign to Equitable any and all "awards" made to the mortgagor, whether or not they

had anything to do with the mortgaged premises. Yet Equitable would not argue that Mr. Sampson was obliged to assign an award made to him by the Jaycees as "business man of the year." One reads on and sees that the Clause purports to bind subsequent "owners of the mortgaged premises." This indicates strongly that the "awards" are only those made to a person in his capacity as owner or, say, in respect to his ownership. If the title passes to another, subject to the mortgage, the former owner would remain obliged only with respect to awards to him, and the new one only with respect to awards to him, all to the extent and only to the extent they were awards with respect to ownership. It is, therefore, a possible question whether an award that, absent agreement, would pass to a former owner is within the meaning of Clause 20. There is at least some ambiguity as to that. If the former owner and the new owner agree that the former owner, not the new one, shall receive any particular award, this shows an understanding by them that the award is not made with respect to ownership, but is a personal asset of the prior owner. Such an understanding would not bind the mortgagee if he was not aware of it, but if he was aware, and made no protest, this would tend to show that his understanding of the meaning of Clause 20 was the same as that of both the new and the old mortgagors. Here the mortgagee not only made no protest, but was a party to a tri-lateral series of transactions, of which the retention of the restoration claim by the SID group was an integral part. Thus we think the pratical construction of all the parties supports the conclusion that Clause 20 was not meant to cover a claim by the former mortgagor against a former lessee for damages for breach of a convenant in the lease, even if it does cover some other things than condemnations. If the rehabilitation damages had been

deemed part of the Clause 20 security, all parties would have agreed they should pass to the new mortgagor. While the waste committed by the Government impaired Equitable's security to some extent, the deal contemplated making this good with funds obtained otherwise than from the Government. Counsel before us seemed all to agree that, antecedently considered, the claim against the Government looked like an extremely long shot.

IV

We can be helped a little more in the construction of Clause 20 by Judge Port's calling it a condemnation clause, and as such, it served the function of protecting the mortgagee from loss of his security as the result of condemnation proceedings, and other proceedings of the same general character. It gave Equitable a claim to monies that stood in the place of the mortgaged premises. Consequently if the mortgagee, as here, has subsequently discharged the mortgagor, prior to any award and without reserving any rights in the award, the mortgagee can take no share in the award. We reached a similar conclusion in *Beaconwear Clothing Co.* v. *United States*, 174 Ct. Cl. 40, 52, 355 F. 2d 583, 590 (1966). In *Beaconwear* the terms of the assignment were similarly broad and absolute in style, but the bank had already discharged the debt by payment—and consequently the assignment was held to be void as to any further obligations. We said at 52, 355 F. 2d 590:

> ***Generally, an assignment made as collateral security for a debt gives the assignee only a qualified interest in the assigned chose, commensurate with the debt or liabilities secured, even though the assignment appears to be absolute on its face.***

Here the facts are conclusive that mortgagor SID's liability was not personal but was restricted to the building itself—and that Equitable at the very least acquiesced in a series of agreements by which the second mortgagee took full possession and title to all of SID's interest in the building—in effect discharging the only liability SID had ever had on the mortgage. The subsequent novation of the mortgage with the new owners confirms this discharge analysis. Consequently, absent any right or title against SID under the mortgage *(i.e.,* no debt), Equitable is without any rights against SID under Clause 20 which requires a debt as a condition precedent. *Beaconwear, supra.*

V

While it is not as clear as could be, the whole tenor of Judge Port's opinion suggests to us that Equitable is seeking to litigate an issue on which it is estopped. The October 2, 1967, assignment of the right to the condemnation award, from SID to CIC, quoted by Judge Port in footnote 3 at 494, *supra,* conflicts with the obligation of SID and assumed by CIC under Clause 20. It is clear from the decision that Equitable waived this breach. But it also seems to be the more likely conclusion that Equitable waived its rights to the rehabilitation award at the same time. All the subsequent events bear out the conclusion that Equitable tacitly acquiesced in CIC's agreements with SID in their entirety until March 12, 1971, when Equitable suddenly discovered SID's "worthless" claim was supported by a $750,000 estimate and Equitable's new mortgagor Investors Funding Corp., was going bankrupt.

The conclusive support for this theory is contained in Equitable's own deed of July 30, 1968. At the bottom of the

very first page, Equitable recites that there are "no offsets, set-offs, defenses or counter-claims against said Mortgage notes and mortgages and the monies due thereunder". These were the mortgages originally made by SID, but CIC was now the substituted mortgagor. If Equitable were truly due the monies from our judgment by virtue of Clause 20, they would also constitute "offsets" against the monies due from CIC under the mortgage. It is inconsistent for Equitable to seek full payment from Investors Funding under the mortgage novation of July 30, 1968, and to also seek the same money from SID—all the while denying the existence of offsets, set-offs, defenses, and counter-claims.

Even if we did not believe that the July 30, 1968, mortgage novation clearly reflects the understanding of Equitable in light of the 1967 agreements (*i.e.,* that Equitable waived any claim to SID's rehabilitation damages award in the 1967 agreements), the New York law applies the doctrine of estoppel by deed to bar Equitable from challenging its own statement of the facts in its mortgage, *Van Winkle* v. *Van Winkle,* 95 App. Div. 605, 89 N.Y.S. 26 (1904) *aff'd,* 184 N.Y. 193, 77 N.E. 33 (1906).

Therefore Equitable's claim falls because Clause 20 is inapplicable to the case, for failure to meet the condition precedent of a current mortgage debt of SID's to apply the award to (under Clause 20), and for estoppel by deed by Equitable's holding out that it had no such offset (as these damages) to amounts due Equitable under its mortgage with Investors Funding on the Chimes building.

The parties have debated quite a number of other issues, but our analysis of the legal effect of Clause 20, given above,

Appendix C. Decision of original three judge panel of Court of Claims entered May 14, 1975, determining Equitable had no interest of SEID's award.

makes it unnecessary for us to go into them, and we therefore refrain from doing so.

In view of the foregoing, after consideration of the motions of the parties and the briefs and arguments of counsel, the plaintiff's motion for summary judgment is granted and the intervening petitioner's motion for summary judgment is denied. The intervening petition is dismissed and the previous judgment for the plaintiff is reaffirmed.

Appendix D. Decision of full panel granting Equitable motion for rehearing, entered June 27, 1975

IN THE UNITED STATES COURT OF CLAIMS

WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW, AND ARTHUR A. BOGEAUS CO-PARTNERS, D/B/A SOUTHEASTERN INDUSTRIAL DEVELOPMENT DISTRICT,

Plaintiffs

AND

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Plaintiff-Intervenor

v.

THE UNITED STATES,

Defendant

No. 379-68

Before COWEN, *Chief Judge,* SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges*.

ORDER

This case comes before the court on the motion for rehearing and suggestion for rehearing *en banc* filed by the

Appendix D. Decision of full panel granting Equitable motion for rehearing, entered June 27, 1975.

plaintiff-intervenor. Upon consideration thereof, together with the opposition of plaintiffs,

IT IS ORDERED that this case shall be reheard *en banc,* and it is placed on the October 1975 calendar of the court for oral argument.

IT IS FURTHER ORDERED that each party may, within not to exceed 45 days from this date, file a supplemental brief consisting of not more than 20 pages (size 8½" x 11" and double spaced). The time for filing the supplemental briefs shall run concurrently and special emphasis and attention shall be devoted in the briefs to the following:

(a) The question as to whether Clause 20 was intended as a condemnation clause only;

(b) The question as to whether this court's decision in *Beaconwear Clothing Co.* v. *United States,* 174 Ct. Cl. 40, 355 F.2d 583 (1966), is applicable in this case, and

(c) The question as to whether the plaintiff-intervenor is estopped to recover this action, including a discussion of the applicability of the New York case of *Van Winkle* v. *Van Winkle,* 95 App. Div. 605, 89 N.Y.S. 26 (1904) *aff'd,* 184 N.Y. 193, 77 N.E. 33 (1906).

Jun 27 1975

By the Court,

WILSON COWEN,
Chief Judge.

Appendix E. Decision of full Court of Claims bench after rehearing as lack of authority to fix attorneys fees, entered October 24, 1975

IN THE UNITED STATES COURT OF CLAIMS

WALTER J. SAMPSON, ET AL.

AND

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

v.

THE UNITED STATES

No. 379-68

Before DAVIS, *Presiding Judge,* SKELTON, NICHOLS, KUNZIG, and BENNETT, *Judges.*

ORDER

At oral argument of this case before the court *en banc* on October 10, 1975, Mr. Hershel Shanks, attorney for intervenor, Equitable Life Assurance Society of the United States, advised the court that in the event judgment was entered for his client, the intervenor, it would pay Mr. John B. Carroll, attorney for the plaintiffs, a reasonable attorney fee for his services in prosecuting this case, but that so far they

Appendix E. Decision of full Court of Claims bench after rehearing as lack of authority to fix attorneys fees, entered October 24, 1975.

had not been able to agree on the amount of a reasonable attorney fee to be paid by Equitable in the event judgment is entered in its favor in this case. Mr. Carroll, who was present, acquiesced in this statement by his silence.

While the court has no authority to award an attorney fee to Mr. Carroll in the event Equitable should prevail in the judgment, and Mr. Carroll cannot assert an attorney's lien against any judgment in this case, nevertheless, the court feels in the interest of fairness and justice that this issue should be settled prior to the entry of any judgment.

Accordingly, proceedings in this case are suspended until the court is furnished with an agreement between Equitable and Mr. John B. Carroll specifying the amount of attorney fee Equitable will pay to Mr. Carroll in the event judgment is entered in this case in favor of Equitable.

By the Court,

OSCAR H. DAVIS,
Oscar H. Davis,
Presiding Judge.

Oct 24 1975

Appendix F. Decision of the full Court of Claims bench after the rehearing as to mortgagee's claim to award entered January 28, 1976

IN THE UNITED STATES COURT OF CLAIMS

No. 379-68

(Decided January 28, 1976)

WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW, and ARTHUR A. BOGEAUS, CO-PARTNERS, D/B/A SOUTHEASTERN INDUSTRIAL DEVELOPMENT DISTRICT, Plaintiffs, and THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Plaintiff-Intervenor, v. THE UNITED STATES

John B. Carroll, attorney of record for plaintiffs. Carroll, Carroll & Butz, of counsel.

Hershel Shanks, attorney of record for plaintiff-intervenor. Glassie, Pewett, Beebe & Shanks and James Bruce Davis, of counsel.

Herbert Pittle, with whom was Assistant Attorney General Wallace H. Johnson, for defendant.

Before Davis, Skelton, Nichols, Kunzig, and Bennett, *Judges.*

Appendix F. Decision of the full Court of Claims bench after the rehearing as to mortgagee's claim to award entered January 28, 1976.

On Plaintiff-Intervenor's Motion For Rehearing

Skelton, *Judge,* delivered the opinion of the court:

This case involves the claim of Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow, and Arthur A. Bogeaus, Co-partners, doing business under the name of Southeastern Industrial Development District (SID or plaintiff), as former owners of the Chimes Office Building in Syracuse, New York, to an award of $292,574.26 assessed against the United States, a former lessee of the building, as restoration damages upon the termination of the lease, as recommended by Trial Judge Spector and approved by an order of the court of June 28, 1974, in 204 Ct. Cl. 920, from which no appeal was taken. The Equitable Life Assurance Society of the United States (Equitable) intervened in the suit before trial claiming that it is entitled to the award as mortgagee of the building in accordance with the terms of its mortgage and the assignment contained therein, so that the proceeds of the award can be applied on its unpaid mortgage indebtedness. SID moved to dismiss the intervention by Equitable. A decision on the motion was postponed until the merits had been decided, and we are now required to decide whether to allow the motion to dismiss Equitable's intervention, and if denied, to decide who is entitled to the award. Both parties moved for summary judgment and oral argument was heard by a panel of the court, after which judgment was entered granting plaintiff's motion for summary judgment, denying that of Equitable and dismissing Equitable's petition in intervention. See slip opinion of May 14, 1975.

Following the above opinion, Equitable moved for a rehearing *en banc* which was granted, although SID opposed

Appendix F. Decision of the full Court of Claims bench after the rehearing as to mortgagee's claim to award entered January 28, 1976.

the motion. Additional briefs were filed and oral argument was heard by the *en banc* court. We reverse the decision of the panel and hold that Equitable is allowed to intervene and that as mortgagee and assignee it is entitled to the $292,574.26 award to be applied on its unpaid mortgage debt.

It appears that it will be necessary to again describe the basic facts upon which this controversy is based. The Chimes Building was built by the Hubb City Realty Corporation in 1928 at a reported cost of $1,420,000. That corporation executed a bond in the sum of $1,200,000 and a mortgage on the property to Metropolitan Life Insurance Company, recorded August 31, 1929, in Liber 750 of Mortgages, page 641, County Clerk's Office, Onondaga County, New York. Another bond in the sum of $600,000 and mortgage was given on the building by James E. and Blanche O. Hefferman to the Syracuse Trust Company on March 20, 1928, which was recorded the same day in Liber 725 of Mortgages, page 129 of said county. In due time, Equitable acquired these bonds and mortgages and combined and consolidated them with later mortgages, as will be described below.

On July 5, 1946, the Onondaga Holding Corporation acquired the Chimes Building subject to the above mortgages. On December 3, 1946, the United States leased the building from the corporation for $250,000 per year for five years with three five-year renewal options.

After leasing the building to the Government, the Onondaga Holding Corporation desired to consolidate the 1928 and 1929 mortgages, and such prior mortgages were combined and consolidated with the new mortgage, dated December 26, 1947. This consolidation was advantageous to Onon-

daga because the debts were consolidated into one debt and the dates and amounts of payments were made more flexible. This 1947 mortgage is recorded in Book 1310, page 663, of Mortgages, Onondaga County, New York. It is important, because for the first time an assignment of awards was made to Equitable. This assignment appears in Clause 20 as follows:

> 20. That any and all awards heretofore and hereafter made to the present and all subsequent owners of the mortgaged premises by any governmental or other lawful authorities for taking by eminent domain the whole or any part of said premises or any easement therein, including any awards for any changes of grade of streets, are hereby assigned to the holder of said mortgage who is hereby authorized to collect and receive the proceeds of any such awards from such authorities and to give proper receipts and acquittances therefor, and to apply the same toward the payment of the amount owing on account of said bond and mortgage, notwithstanding the fact that the amount owing thereon may not then be due and payable; and the said party of the second part convenants and agrees, upon request, to make, execute and deliver any and all assignments and other instruments sufficient for the purpose of assigning the aforesaid awards to the holder of said mortgage, free, clear and discharged of any and all encumbrances of any kind or nature whatsoever.

It will be noted that the assignment of awards in Clause 20 in this 1947 mortgage is limited to awards by the Government "*for taking by eminent domain the whole or any part of said premises* * * *." [Emphasis supplied.] It is important to note that this limitation of awards to those for Government taking

by eminent domain was omitted and does not appear in later (1954) mortgages executed by SID to Equitable, where the assignment covers *all awards* made by *anyone*. As will be shown below, neither the Government nor takings by eminent domain are even mentioned in the assignments in the 1954 mortgages executed by SID and upon which the parties base their claims in this case.

On February 29, 1952, over four years after Onondaga executed the 1947 mortgage to Equitable, SID acquired the Chimes Building for $3,000,000. At that time SID needed additional funds and to take care of this need it borrowed $284,625 from Equitable and in connection therewith executed a bond and mortgage dated April 1, 1954, recorded in Book 1642, page 221, of Mortgages, Onondaga County, New York. This mortgage contains an assignment of *all awards* made or to be made to the present and all subsequent owners of the building to Equitable as security for the payment of the bond. This assignment, as pointed out above, was a revision and a rewriting of what appeared in Clause 20 of the 1947 mortgage quoted above. The revised Clause 20 (although it is not so numbered in this 1954 mortgage) provides as follows:

> Together also with any and all awards heretofore made and hereafter to be made to the present and all subsequent owners of said premises, including any award and awards for change of grade of any street affecting said premises, which said award and awards are hereby assigned to the mortgagee, who is hereby authorized and empowered to collect and receive such award and awards and to give proper receipts and acquittances therefor, and to appy [sic] the same toward the payment of the

amount owing on this mortgage, notwithstanding the fact that the amount owing on this mortgage may not then be due and payable; and the mortgagor for himself, his heirs and all subsequent owners of said premises, hereby convenants and agrees with the mortgagee and the successors and assigns of the mortgagee, upon request by the holder of this mortgage to make, execute and deliver any and all assignments and other instruments sufficient for the purpose of assigning said award and awards to the holder of this mortgage, free, clear and discharged of any encumbrances of any kind or nature whatsoever.

On the same day, April 1, 1954, SID executed a new bond and mortgage in favor of Equitable in which it was recited that Equitable was the owner and holder of the bonds and mortgages of 1928, 1929, and 1947 described above, together with SID's bond and mortgage of April 1, 1954, in the sum of $284,625, and on all of which there was owing to Equitable $1,650,000, all of which bonds and mortgages were combined and consolidated and spread over the property. This consolidated mortgage of April 1, 1954, is recorded in Book 1643, page 631, of Mortgages, Onondaga County, New York. It is important to note that this consolidated mortgage of April 1, 1954, recites that the premises are leased to the United States under a lease with Onondaga Corp. dated December 3, 1946, recorded in Liber 1311, page 249, Conveyances of Onondaga County, New York. The facts show that the Government had occupied the building since about December 3, 1946, and that it had made many alterations and changes in the building, such as removal of corridors, walls and partitions, lights, changes to terrazzo floors, elevator doors, marble and wood fixtures. The Government was

obligated by the terms of its lease to restore the leased premises at the end of the lease to the condition they were in when the lease began, reasonable wear and tear and damages by the elements, excepted. It was obvious to any reasonable person that when the Government vacated the premises, it would have to either restore the premises at its own cost and expense or make a monetary award in lieu thereof.

Under these circumstances, SID executed the April 1, 1954, consolidated mortgage mentioned above in which it assigned to Equitable "*all awards* heretofore made or hereafter made to the present and all subsequent owners of the mortgaged premises as security for the mortgage debt." This assignment is contained in Clause 20 of the April 1, 1954, Consolidated Mortgage as follows:

20. The party of the second part for themselves, their heirs, legal representatives, successors and assigns, does hereby assign to said party of the first part, its heirs, legal representatives, successors and assigns any and all awards heretofore made and hereafter to be made to the present and all subsequent owners of the mortgaged premises, including any award and awards for change of grade of any street affecting said mortgaged premises, and said party of the first part, its heirs, legal representatives, successors and assigns is hereby authorized and empowered to collect and receive such award and awards and to give proper receipts and acquittances therefor, and to apply the same toward the payment of the amount owing on said bond and mortgage, notwithstanding the fact that the amount owing on said bond and mortgage may not then be due and payable, and said party of the second part for themselves, their heirs, legal represen-

> tatives, successors and assigns hereby covenants and agrees with said party of the first part, its heirs, legal representatives, successors and assigns upon request to make, execute and deliver any and all assignments and other instruments sufficient for the purpose of assigning said award and awards to the holder of said bond and mortgage, free, clear and discharged of any incumbrances of any kind or nature whatsoever.

It will be noted that this assignment is all inclusive and assigns "*all awards*" by anyone whomsoever, and that SID "covenants and agrees with the mortgagee [Equitable] to make, execute, and deliver any and all assignments and other instruments sufficient for the purpose of assigning said award and awards to the holder of said bond and mortgage, free, clear, and discharged of any incumbrances of any kind or nature whatsoever."

It would be difficult indeed to write an assignment more all inclusive, more comprehensive, and more unambiguous than the assignment of all awards made by SID to Equitable in the 1954 consolidated mortgage as security for Equitable's unpaid mortgage debt.

The plaintiff (SID) ratified and confirmed the Consolidated Mortgage of 1954, which is presently in force, on September 1, 1966, when it signed an extension agreement with Equitable extending the time of payment of the mortgage debt. The extension agreement provided:

> * * * Nothing herein contained shall invalidate any of the security now held for said indebtedness or impair any of the conditions of the Bond and Mortgage except as herein specifically provided.

The extension agreement did not change the assignment of *all awards* in the mortgage. The foregoing provision had the effect of ratifying and confirming the assignment provisions in the mortgage.

Thus, we see that SID assigned all awards to Equitable twice in 1954 in the two mortgages it signed that year, and in 1966 ratified and confirmed the assignment provisions in the 1954 consolidated mortgage by the extension agreement.

SID claims in the instant suit that the assignment is limited to awards for eminent domain takings by the Government. There is no such limitation in the assignment in the 1954 consolidated mortgage. The 1947 mortgage did have such limitation, but it was executed more than four years before SID owned the property and SID had nothing to do with that mortgage. Furthermore, the 1947 mortgage was replaced, combined, and consolidated by the 1954 mortgage signed by SID. it would appear that SID is trying to apply and enforce the limitation in the 1947 mortgage, which is no longer in force with regard to its claim here. This it cannot do. We hold that Ciause 20 in the 1954 consolidated mortgage assigned *all awards* made by anyone past, present, and future, with respect to the mortgaged property, to Equitable as mortgagee as security for its mortgage debt, and that the assignment included the restoration award of $292,574.26 involved in the present suit. Equitable is entitled to recover such award so that it can be applied on the unpaid mortgage debt.

SID challenges Equitable's right to the award for other reasons which we will now consider.

The record shows that there was a second mortgage on the property to Irving Trust Company which was in default in

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1966. City Investing Company (CIC) became the assignee of Irving Trust Company and commenced foreclosure proceedings against SID in a district court. In October 1967, CIC accepted a deed to the property from SID, which of course was subject to Equitable's first mortgage, in lieu of foreclosure. CIC and SID agreed *beween themselves* at the time that CIC would receive any compensation award for rent as a result of a condemnation suit filed by the United States to acquire the use of a part of the Chimes Building it had previously leased, for a further period ending November 30, 1967. *See United States* v. *Certain Space, Syracuse, New York,* 320 F.Supp. 491 (N.D. N.Y. 1969), *aff'd,* 435 F.2d 872 (2d Cir. 1970), *cert. denied,* 402 U.S. 908 (1971). CIC and SID further agreed *between themselves* that any restoration award for damages to the building (as distinguished from a claim for rent) was reserved to SID. Equitable was not a party to this agreement and knew nothing about it until it received a letter from SID dated May 6, 1968, in which was enclosed a letter from CIC to SID dated September 14, 1967, describing the agreement. In its letter of May 6, 1968, SID asked Equitable to accede to the agreement between CIC and SID. Equitable refused, as shown by its letter of May 14, 1968, stating:

> As you may know, Equitable's mortgage on the captioned premises has not yet been paid off and, accordingly, Equitable does not wish at the present time to waive any rights which it may have under such mortgage.

It should be pointed out that as early as March 2, 1967, SID asked Equitable in a letter of that date to waive its rights to any restoration claim against the Government. Equitable refused in a letter to SID dated March 9, 1967, saying:

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> In your letter of March 2 you have requested that the Equitable waive any claim to damages accruing during the term of the lease. I am not sure just what this term means. If it has reference to damage to the building which would incur costs for repairs or refinishing because of the government use, it would seem that the Equitable would be entitled to such reimbursement so that the building could be brought back as near as possible to its condition prior to the beginning date of the lease, reasonable wear and tear accepted [sic]. * * *

On May 20, 1968, SID again wrote to Equitable asking it to waive its rights under the mortgage and Equitable again refused in a letter to SID dated May 22, 1968.

The foregoing correspondence has been considered in detail because SID now claims that Equitable has waived its rights to the restoration award by not objecting to the agreement between CIC and SID. This argument is unpersuasive. Equitable was not a party to the agreement and did not even know about it until long after it had been made. The agreement is not binding on Equitable and it did not waive any rights it had under the mortgage by not objecting to something it did not know about. Furthermore, the foregoing correspondence between it and SID shows without question there was no waiver by Equitable.

SID also contends that Equitable waived its right to the restoration award by events that occurred at the trial of *United States* v. *Certain Space, supra.* We find this argument without merit. The facts in that case show that at the trial SID asserted three claims; namely, (1) a claim for rent for the space condemned; (2) the restoration of the premises claim;

and (3) a "loss of equity" claim. During the proceedings, the court stated that the restoration claim could not be asserted in the condemnation case but would have to be pursued in the United States Court of Claims. The court further found that SID had no "loss of equity" claim. This left only the rent claim. Although Equitable could have asserted its right to the rent award under Clause 20 of its mortgage, it generously did not do so and waived its right to the rent claim. Equitable took the position that the condemnation award for the use of the building was the same as rent and that since its mortgage was not in default, it would not claim the award for rent.

SID contends that when Equitable waived its rent claim in the above case, it also waived its right to the restoration award. The court in that case rejected this argument of SID by saying:

> * * * [D]efendant Equitable has waived its right to lay a claim to any part of the just compensation. However, if SID has some *residual rights* [*i.e.*, "loss of equity" claim and the restoration claim] left under the assignment, [from SID to CIC] Equitable, in that case, asserts that it becomes entitled to them under the condemnation clause found in its first mortgage. [Emphasis supplied.] [320 F.Supp at 496.]

Again the court recognized that there was no waiver of the restoration claim by Equitable and that in fact it belonged to Equitable. The Court said:

> Even if SID had some residual rights left under the assignment, Equitable, as noted earlier, asserts that it becomes entitled to them under the condemnation clause in its first mortgage. *This stands as a further bar to*

> *SID's claim.* [Footnote omitted] [Emphasis supplied] [320 F.Supp at 497]

The court referred to footnote 7 in its holding last above quoted, in which footnote Clause 20 of the 1954 consolidated mortgage is set forth in full. [320 F. Supp at 497.]

We hold that Equitable did not waive its right under Clause 20 of the mortgage to the restoration award when it waived its right to the rent claim.

SID argues that Equitable is estopped to claim the restoration award because on July 30, 1968, an extension agreement was executed between Salina Onondaga Company, a New York limited partnership, the then-owners of the building and Equitable wherein it was recited:

> WHEREAS, * * * there are no offsets, set-offs, defenses or counter-claims *against said Mortgage notes and mortgages* and the monies due thereunder *and that said mortgages*, as consolidated and spread, *are a first and valid lien upon the premises described therein;* * * * [Emphasis supplied.]

SID invokes the principle of estoppel by deed, citing *Van Winkle* v. *Van Winkle*, 95 App. Div. 605, 89 N.Y.S. 26 (1904), *aff'd*, 184 N.Y. 193, 77 N.E. 33 (1906). SID argues that the above quoted clause estops Equitable from claiming the restoration award in question. We do not agree, and find the argument without merit. The clause nowhere contains a statement directly or indirectly that Equitable has no claim to the award. We agree with the principles set forth in the *Van Winkle* case. It merely held that "* * * a recital in a deed of a material fact is binding and conclusive *upon the parties and*

those claiming under them in privies in blood, in estate or in law." [Emphasis supplied.] [89 N.Y.S. at 28.] SID is neither a party, heir, assignee, nor successor to the extension agreement of July 30, 1968, and was not misled thereby. The elements of estoppel are not present. The doctrine of estoppel by deed is not applicable, and cannot be invoked, by one (like SID) who is neither a party nor privy to the extension agreement from which the alleged estoppel by deed arises. 28 Am. Jur. 2d. *Estoppel and Waiver* §§ 8, 21, 114, 115; 31 C.J.S. *Estoppel* §§ 46, 47 at 351-52; and *Liberty Bank of Buffalo* v. *High Park Development Co.*, 134 Misc. 733, 236 N.Y.S. 194 (Sup. Ct. 1929), 227 App. Div. 647 *aff'd*, 234 N.Y.S. 832 (Sup. Ct. 1929). The New York Court of Appeals has stated:

> Estoppels must be mutual; and none can avail themselves of them except parties or privies. [236 N.Y.S. at 201.]

See Walrath v. *Redfield*, 18 N.Y. 457, 460 (1858); *Finnegan* v. *McGuffog*, 203 N.Y. 342, 96 N.E. 1015 (1911). *See also, Litchfield* v. *Goodnow*, 123 U.S. 549; 551-52 (1887); and *White* v. *Croker*, 13 F. 2d 321, 324 (5th Cir. 1926), *cert. denied*, 273 U.S. 715.

In *Liberty Bank of Buffalo* v. *High Park Development Co., supra*, the court held:

> Estoppel by deed or by record is operative only to the parties to the deed or record and their privies; *strangers to the deed or record are not bound by, nor can they invoke, the estoppel* * * * [Many New York cases cited, including *Walrath* v. *Redfield*, cited above.] [Emphasis supplied.] [236 N.Y.S. at 201.]

Therefore, even if estoppel by deed is applicable here, which it is not as will be shown below, SID is in no position to assert it, because it is neither a party to the extension agreement nor one claiming under a party thereto and was in no way misled by the agreement.

In any event, the quoted language in the extension agreement is standard language used to prevent a mortgagor from claiming he has any defenses or offsets to the mortgage debt. It is strictly for the protection of the mortgagee in exchange for its extending the time for the payment of the debt. The debt is owed to the mortgagee and it makes no sense that the mortgagee or creditor would say that it had no offsets, etc., to a debt that is owed to it. The recited language makes sense only as a disclaimer by the mortgagor of any defenses it has to the debt owed to the mortgagee. It will be remembered that the recited language in the extension agreement states that there are no offsets, etc., "*against* said mortgage notes and mortgages." (Emphasis supplied.) It would not be logical for a mortgagee (creditor), such as Equitable, to agree that it has no offsets, etc., *against* a debt owing to it. The debtor is the only one to which such a statement is applicable.

Black's Law Dictionary 1237 (4th ed. 1951, Rev.) defines "offset" as "a *contrary* claim or demand by which a given claim may be lessened or canceled." (Emphasis supplied.) Webster's New Collegiate Dictionary defines "set-off" as "the discharge of a debt by setting *against* it a distinct claim *in favor of the debtor.*" (Emphasis supplied.) See 20 Am. Jur. 2d. *Counterclaim, Recoupment & Setoff* § 2. The New York cases hold that "counterclaim" includes "setoffs." *See Seibert* v. *Dunn*, 216 N.Y. 237, 110 N.E. 447 (1915); *Otto* v. *Lincoln Savings Bank of Brooklyn*, 51 N.Y.S. 2d. 561, 268 App. Div.

400 (1944), *aff'd*, 294 N.Y. 798, 62 N.E. 2d 236 (1945); and 20 Am. Jur. 2d *Counterclaim, Recoupment & Setoff* § 3. It has been held that the "sole purpose of a counterclaim is to defeat or diminish the demand of a plaintiff" (in this case the demand of Equitable, the assignees and mortgagee). *See Schultz* v. *Wilson*, 59 Misc. 2d 14, 297 N.Y.S. 2d 478, 480 (1969); *White* v. *Bevilacqua*, 273 N.Y 282, 7 N.E.2d 134 (1937).

The above cases show that the terms recited in the extension agreement refer to situations wherein *a debtor* asserts a claim *against a creditor* in the nature of an offset to reduce the debt. It is obvious that only the debtor or mortgagor can have an "offset, set-off counterclaim or defense" against the mortgage debt. Accordingly, the recitation in question in the extension agreement can only be a representation by the debtor or mortgagor and not by the creditor or mortgagee (Equitable).

The estoppel by deed theory of SID is further negated by other provisions of the extension agreement, such as:

> (e) Mortgagor to pay for * * * such fees as a title insurance company will charge to endorse the existing title policy *to insure the continued validity and priority of the mortgagee's interest in said premises.*
>
> * * *
>
> (i) *That the aforesaid mortgage notes and mortgages* are a valid subsisting obligation upon the premises described in such mortgages, and as such, *are a first lien, as consolidated, upon the premises described therein.*
>
> (j) Except as herein modified and extended, *the terms, covenants and conditions of such mortgages as consolidated, shall remain in full force and effect.* [Emphasis supplied.]

Nothing in the consolidated mortgage was modified or extended by the agreement, except the amounts of the payments on the note and the dates when such payments were to be made. Clause 20 of the mortgage was not mentioned nor changed in any way. Actually, the whole tenor of the agreement was to continue the mortgage in full force and effect as to all its terms and provisions, which, of course, included the assignment in Clause 20.

We hold that Equitable is not barred by the doctrine of estoppel by deed by reason of the recitals in the July 30, 1968, extension agreement from asserting its claim to the restoration award under Clause 20 of its 1954 consolidated mortgage.

As a matter of fact, it is possible that Equitable could have invoked the doctrine of estoppel by deed against SID, because SID unequivocally assigned *all awards* made with respect to the leased premises by anyone to Equitable in two different 1954 mortgages and ratified and confirmed the consolidated 1954 mortgage in an extension agreement of 1966, all as shown above, all of which was relied on by Equitable. Now SID is attempting to contradict the provisions of such mortgages and extension agreement. However, Equitable has not urged this doctrine and we are not required to decide it and do not do so.

SID says that Equitable is not entitled to the restoration award because of our decision in *Beaconwear Clothing Co.* v. *United States*, 174 Ct. Cl. 40, 355 F.2d 583 (1966). We do not agree. That case is clearly distinguishable from the instant case and is inapposite to our case. In that case, Beaconwear has assigned its claim against the Government to a bank to secure the loans made to finance performance of Beacon-

wear's contract with the Government. The entire debt was repaid to the bank. Nevertheless, the bank sought to obtain a judgment on the basis of the assignment so as to obtain funds for an unpaid subcontractor and thereby avoid a counterclaim of the Government against Beaconwear. We ruled against the bank because the debt to the bank had been discharged by payment and it no longer had any financial interest in the obligation. SID argues here that Equitable is in the same position as the bank in *Beaconwear*. We do not agree. In *Beaconwear* the bank had been paid in full and had no further interest in the ligitation. In contrast, in our case, Equitable's debt has not been paid and it has every right to assert its claim to the restoration award under its assignment and mortgage. If Equitable's debt and mortgage had been paid in full, it would be in the same position as the bank in *Beaconwear* and would have no right to assert a claim to the restoration award, but this is not the situation because Equitable's debt and mortgage have not been paid. Consequently, as stated above, the *Beaconwear* case is not controlling here.

SID argues further that when Equitable executed the extension agreement of July 30, 1968, with the then owners of the property without the consent of SID, the agreement had the effect of releasing SID from any obligation with respect to the debt and mortgage in favor of Equitable. We do no agree. SID was never liable personally on the bond or mortgage in favor of Equitable. By this argument, SID attempts to invoke the principle that when a creditor extends the date of payment of a note without the consent of the surety or the person secondarily liable, the surety or the person secondarily liable is discharged from all liability on the note. The defect in this

argument is that SID was never personally liable directly or secondarily to Equitable on the note. Consequently, when Equitable entered into the extension agreement of July 30, 1968, the then owners of the property, it had no effect whatever on Equitable's right to claim the restoration award under Clause 20 of its 1954 consolidated mortgage.

SID claims that Equitable has slept on its rights and is not entitled to receive the restoration award in this case because SID filed the suit for the award and won the award and is entitled to it. Again, we find this position of SID without merit. The 1954 consolidated mortgage signed by SID provided in pertinent part as follows:

> 13a. That a substantial portion of the mortgaged premises are leased to the United States of America * * * and [SID] does hereby agree:
>
> (a) To faithfully abide by, perform and discharge each and every obligation, covenant and agreement of the lease by lessor to be performed; *at the sole cost and expense of the party of the second part* [SID] to enforce or secure the performance of each and every obligation, covenant, condition and agreement of the lease by the lessee to be performed; * * *.
>
> (b) *At the party of the second part's* [SID's] *sole cost and expense* to appear in and defend any action or proceeding arising under, growing out of or in any manner connected with the lease or the obligations, duties or liabilities of lessor and lessee thereunder, *and to pay all costs and expenses of the party of the first part,* [*Equitable*] *including attorney's fees* in a reasonable sum in any such action or proceeding in which the party of the first part [SID] may appear. [Emphasis supplied.]

Appendix F. Decision of the full Court of Claims bench after the rehearing as to mortgagee's claim to award entered January 28, 1976.

As shown above, SID was obligated at its sole cost and expense to enforce all covenants and obligations of the lessee [the Government] specified in the lease. One of such covenants and obligations of the lessee, as provided in paragraph 8 of the lease, was to "restore the premises to the same condition as that existing at the time of entering upon the same under this lease, reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control, excepted" at the end of the lease.

Thus, we see by the specific terms of the mortgage, SID was obligated to see that the Government restored the premises at the end of the lease. In filing the suit against the Government for the restoration award, SID did what it was required to do under the provisions of the mortgage. In any event, Equitable intervened in the suit before trial. Therefore, there is no merit to SID's argument that Equitable slept on its rights.

The attorney for SID alleges that he has an agreement with SID that would allow him an attorney fee of 40 percent of any recovery by SID in this case, and that the court should allow him an attorney fee in this amount. Of course, under our judgment there is no recovery by SID and the 40 percent contract is of no help to its attorney. His claim for an attorney fee is not against the United States but is a contingent claim against an award to SID if there had been such award. The attorney has no definite agreement with Equitable as to an attorney fee. However, despite the fact that his efforts have been adverse to Equitable's claim in this case, Equitable has stated in its brief and through its attorney at oral argument that it is willing to pay SID's attorney a reasonable attorney fee, but the amount is not stated. We suspended proceedings in this case until the parties agreed upon such attorney fee. However, a reasonable time has elapsed since such suspension was entered and the court has not been furnished with an agreement as to the attorney fee, and, accordingly, it appears that the suspension should be lifted so that this judgment may be rendered and the case disposed of. Under these circumstances, the parties and SID's attorney are left to settle the attorney fee question themselves, because it is a controversy between private parties in which the Government is not involved and this court will not intervene.

Appendix F. Decision of the full Court of Claims bench after the rehearing as to mortgagee's claim to award entered January 28, 1976.

The decision of the panel of May 14, 1975, is reversed, and the judgment heretofore entered in favor of SID is hereby set aside and vacated. SID's motion to dismiss equitable's plea in intervention is denied and the intervention is allowed. The suspension of the case pending an agreement of the parties with respect to a reasonable attorney fee to be paid by Equitable to SID's attorney is lifted, and judgment is rendered granting Equitable's motion for summary judgment for the restoration award in the sum of $292,574.26 to be applied on its mortgage debt. The motion for summary judgment of SID is denied; and the request of SID's attorney for an attorney fee is also denied. Plaintiff's counsel is directed to return to the clerk of this court the transcript of judgment furnished him on July 2, 1974.

NICHOLS, *Judge,* dissenting:

I respectfully dissent and would still dismiss the intervention as the panel would have done.

This court's *en banc* opinion follows the time honored judicial rule of stating the issues so a reader would conclude

that no qualified lawyer outside of St. Elizabeth's would come in good faith to a result contrary to the court's. Equitable's able counsel found in the panel opinion in this case a statement that Equitable had waived its claim against this court's award under Clause 20, a view he ostentatiously refuted by producing documents which showed Equitable had been asked to do this and had refused. Unless I speak out in dissent, no one will know that the panel found the so-called Clause 20 not to be applicable to the case at all, being at best (from Equitable's point of view) ambiguous and construed otherwise than Equitable's present contention by the prior conduct of all the parties, including Equitable. The offending statement, if not the *mot juste,* plainly referred to this and it required a totally unsympathetic reader not to perceive this was what the panel had in mind when it spoke of a waiver.

See the majority opinion for the text of the Clause. Equitable's counsel freely conceded, both in brief and oral argument, that its sweep was not as broad as its literal language. The court, however, says it would be difficult to write an "assignment more all inclusive * * *" and in a sense that is true. It is so all inclusive it must be narrowed by construction: as written it would apply to an "award" to Mr. Sampson as Jaycee of the Year. (A claim by Equitable to an award of that character would have the support of "legislative history" since the 1947 Clause 20 applied only to awards "by any Governmental or other lawful authority", while the 1954 Clause, here for interpretation, is not so limited.) On the other hand, I can easily conceive of broadening the Clause by making it apply to claims as well as to awards: the consequences of this omission I discuss below. Obviously its interpretation must be intuitive, not literal. It is in fact, if

intended to be clear, most ineptly drafted, well below the normal standards of real estate conveyancers.

Equitable freely concedes it applies only to awards to an owner in his capacity of owner or with respect to his ownership. Since the Sampson group (SID) had no ownership interest in the mortgaged premises whatever, when they first sued in this court, or thereafter at any time to date, it would seem some analysis is wanting, as to why the award we have made is an award to an owner in his capacity as owner or with respect to his ownership. It is an award of damages for breach of a Government contract. Such a problem would not have arisen with the original 1947 form of the Clause, as quoted by the court, since condemnation awards are made *in rem* to any and all owners, as their interests may appear, and no others. Awards for changes in street grade are generally treated the same way. The broadening in the 1954 mortgage raises the problem.

SID and CIC manifestly dealt with the claim that ultimately germinated in our award, as if it did not pertain to ownership. While CIC became owner, and reshuffled accordingly the bundle of rights constituting ownership, SID took the claim which with $10,000, was all it salvaged from its losing investment. Equitable was asked to waive its right, if any, against this claim, and it refused to do so. This the panel did not know until the motion for rehearing. However, the fact falls much short of denial or refutation of SID and CIC's obvious belief that the claim did not pertain to ownership. Indeed, refutation of this was not possible. There was no expression of opposition or alarm by Equitable at the claim falling into the hands of a non-owner for prosecution. SID might have failed to prosecute the claim vigorously for lack of means, or

might have set it off against debts it or its partners owed the Government. Equitable's conduct in refusing an express waiver is best accounted for, I think, by the hypothesis that they didn't know what they had, but whatever it was, they were not going to give it away. I do not read its refusals as plain notice it intended to deprive SID of any success it might gain. It was the intervention in the suit that gave that notice and by then SID had passed the point of no return.

As the panel opinion said:

> * * * If the former owner and the new one agree that the former owner, not the new one, shall receive any particular award, this shows an understanding by them that the award is not made with respect to ownership, but is a personal asset of the prior owner. Such an understanding would not bind the mortgagee if he was not aware of it, but if he was aware, and made no protest, this would tend to show that his understanding of the meaning of Clause 20 was the same as that of both the new and the old mortgagors. Here the mortgagee not only made no protest, but was a party to a trilateral series of transactions, of which the retention of the restoration claim by the SID group was an integral part. Thus we think the practical construction of all the parties supports [our conclusion].

The opinion elsewhere says that "Equitable tacitly acquiesced in CIC's agreements with SID in their entirety until Mar 12, 1971 * * *".

Equitable now says, that it was SID's duty to prosecute the claim, at its sole cost and expense, for the sole benefit of Equitable, with no improvement to SID's equity to anticipate,

for it had none, or other benefit of any kind, except perhaps, the satisfaction of duty disinterestedly performed. Not, please note, that it was SID's duty to let Equitable use its name to prosecute the claim. Just the opposite. If, however, Equitable in 1967-68 genuinely believed the above statement of its rights was accurate, it is impossible to believe it would have done nothing effective to protect and further them against obvious jeopardy. Though this is the bizarre result, (unless and to the extent that Equitable pays a counsel fee for the trial in this court, without visible legal compulsion so to do) antecedently considered, the unlikelihood of SID prosecuting the claim gratuitously for Equitable would have been large. The latter's bare intervention in the suit, leaving prosecution wholly to SID, was not just the minimum, it was far below the least that might have been expected if it really believed the award would be its own. Until intervention, Equitable said and did nothing to refute the obvious and well founded belief of SID and CIC that the claim was not by any owner with respect to his ownership, and therefore not under Clause 20.

It is well established law in this court that the conduct of the parties to a contract may not only interpret an ambiguous clause, but may even overcome plain language. *Gresham & Co.* v. *United States*, 200 Ct. Cl. 97, 470 F.2d 542 (1972), and cases cited. By their conduct SID and CIC displayed their view that the claim against the Government, prosecuted in this suit, was outside Clause 20. It is now clear there existed no express understanding, with Equitable as a party, to that effect, but such an express understanding is not required when the issue is contract interpretation. Equitable knew the others had so agreed.

Equitable of course was entitled to have the Government waste made good, but this was apparently done with new capital long before the claim herein was decided.

The court refers to clauses obliging SID to enforce the Government's lease obligations and to "appear in and *defend*" (emphasis supplied) any litigation relating to the lease. I question what effect this Clause had after SID ceased to be an owner. The parties seem to have hitherto supposed that Clause 20 was the only one that might have remained alive as to SID after that date. The confining of the Clause to defense of suits is significant.

The final curious thing about Clause 20 is that though it assigns awards, it does not assign claims. It looks as if textually SID had a perfect right to deal with the claim as its own, so long as it was just a claim, to decide not to prosecute it, or to set it off against any debt it might owe the Government. (Equitable's assertion of a right to gratuitous prosecution of the claim by SID rewrites Clause 20.) If SID had received a payment from the Government for restoration damages, without suit, it does not look as if Equitable would have had any right to it under Clause 20. Similarly if, after suit was brought, the Government made a settlement payment on condition of dismissal with prejudice. If the word "award" in Clause 20 means, besides condemnation awards only others of an *in rem* nature, the apparent absurdity is accounted for. The taker initiates and controls the action and an award to an owner in some amount is assured. The claimant doesn't have to prosecute, the only problem, normally, for the condemnee being to go in and establish he is entitled to all or part of the deposit in the court registry, as owner or one of the owners. The draftsman, in dropping out his reference to condemnations, may have been intentionally vague as to what

else was covered, whether, specifically *in personam* claims the claimant has full control of and must prosecute throughout if they are to ripen into awards.

At any rate, if I were a mortgagee and desired an assignment that was "all inclusive, * * * comprehensive * * * and * * * unambiguous" in the court's words, I would be far from satisfied with the Clause here under review. I believe the interpretation given by the majority cannot be sustained by the language itself, or the surrounding circumstances, or the conduct of the parties.

The other arguments in the majority opinion I am not disposed to contest as they seek to demolish alternative points in the panel opinion that were relatively weaker than the interpretation point I considered and now consider crucial. It is a good idea both in advocacy and adjudication, to develop your strong point and leave unstated your alternative weaker ones; otherwise you can expect your strong point to be ignored, while pages are devoted to refuting the others.

Appendix G. *United States v. Certain Space*, 320 F. S. 491 affirmed *per curiam* 435 F(2) 872, Certiorari denied 402 U. S. 908 (Related Case)

UNITED STATES OF AMERICA,

Plaintiff,

v.

CERTAIN SPACE IN the PROPERTY KNOWN AS the CHIMES BUILDING, SYRACUSE, ONONDAGA COUNTY, STATE OF NEW YORK, et al.,

Defendants.

No. 66-CV-483.

United States District Court,
N. D. New York.

Dec. 8, 1969.

Purchaser of condemned property moved to fix total just compensation and sought a determination that such amount be awarded to itself to the exclusion of all other claimants. Treating the matter as a motion by purchaser for summary judgment, the District Court, Port, J., held that owner of condemned property did not reserve from assignment to purchaser of that property the "loss of equity" where owner assigned to purchaser "all of our right, title and interest in and to any sum of money found to be due from the United States of America resulting from the condemnation by the United States of America ***".

Summary judgment granted.

Judgment affirmed 2 Cir., 435 F.2d 872.

Appendix G. United States v. Certain Space, 320 F.S. 491 affirmed per curiam 435 F(2) 872, Certiorari denied 402 U.S. 908 (Related Case).

1. United States—111(10)

Anti-Assignment Act is for government's protection, and only United States may assert it. 31 U.S.C.A. § 203.

2. Eminent Domain—90

Damages for "loss of equity" will not be considered independently, if at all, in determining just compensation in a condemnation case.

3. Courts—518

Since by its own terms the "loss of equity" damage in relation to condemnation action was limited, in letter from purchaser of property to owner, to that "resulting from any wrongful or arbitration use of the power of condemnation", which was in effect equivalent to a physical seizure without a condemnation proceeding, such would present a claim over which Court of Claims, rather than federal district court, would have exclusive jurisdiction.

4. Assignments—72

Since all previous correspondence cited by owner of condemned premises and purchaser of such premises as indicative of their intentions was integrated in subsequently executed assignment, only the assignment would determine the rights of the parties.

5. Eminent Domain—153

Owner of condemned property did not reserve from assignment to purchaser of that property the "loss of equity" where owner assigned to purchaser "all of our right, title and in-

terest in and to any sum of money found to be due from the United States of America resulting from the condemnation by the United States of America***".

James M. Sullivan, Jr., U. S. Atty., Syracuse, N. Y., for plaintiff; Samuel T. Betts III, Asst. U. S. Atty., of counsel.

Adolph H. Huttar, Syracuse, N. Y., for defendant SID; Nottingham, Carroll, Paltz, Coughlin & Conan, Syracuse, N. Y., of counsel.

Hancock, Ryan, Shove & Hust, Syracuse, N. Y., for defendant CIC; Howard B. Helf, Syracuse N.Y., of counsel.

Melvin & Melvin, Syracuse, N. Y., for defendant Equitable Life Assurance Society of the United States; Domenic A. Mazza, Syracuse, N. Y., of counsel.

PORT, District Judge.

Memorandum-Decision and Order

City Investing Company (hereafter "CIC"), claiming to be entitled to the entire amount of the award in the above-entitled condemnation action, has moved to fix the total just compensation at the sum of $178,700.00,[1] and for a deter-

[1] By a stipulation dated September 30, 1968, between CIC and the United States, it was stipulated and agreed: (1) that CIC appeared in the action and consented to be joined as a party defendant, and

(2) that the total just compensation to be paid by the United States for the taking of the rights and interests in the Chimes Building, is the sum of $178,700, which sum includes interest, restoration damages and compensation for all other damages or claims for damages arising out of or by reason of said taking, and

(3) that the sum of $140,891.65, previously withdrawn from this court and paid to the Receiver pursuant to the orders of this court, is to be credited against the just compensation stipulated, leaving a balance of $37,808.35 to be paid by the condemnor United States.

mination that said amount be awarded to itself and the exclusion of all other claimants. While not designated as such, the motion will be treated as one for summary judgment; for the reasons hereinafter stated, summary judgment is granted for the relief requested.

CIC bases its claim to the entire award to the exclusion of all others, on an assignment from Southeastern Industrial District (hereafter "SID"). The right of CIC to the entire award, and to stipulate its amount, is contested by SID, the owners of the subject premises at the time the Declaration of Taking, the Complaint in Condemnation, and the Order awarding possession to the United States were filed.

The facts in this case may be set forth as follows:

The Declaration of Taking and the Complaint in Condemnation in this action were filed on December 29, 1966, and $76,850.00 was deposited in the Court for estimated just compensation. The estate sought to be condemned was "the right to use and occupy" *certain portions* of the Chimes Building for:

> a term commencing January 1, 1967, and ending June 30, 1967, with the Government having the right to extend the said use and occupancy of said property for six (6) months to December 31, 1967, upon thirty (30) days prior written notice to the owners, and with the Government having the right to terminate at any time upon giving thirty (30) days prior written notice to the owners, and with the right to make alterations, additions and improvements and with the right in the United States, to remove within a reasonable time after expiration of said initial term or any extension thereof or any earlier ef-

fective date of termination, any and all improvements and structures placed therein or thereon by or for the United States during its use and occupancy of the property under said initial term or any extended term. Complaint in Condemnation, Schedule "A", page 3.

On December 29, 1966, the Court granted an Order of Possession to the United States as of January 1, 1967, on which date SID was the owner of the property.

On March 30, 1967, CIC commenced a state court foreclosure action, to foreclose certain mortgages that it held upon the said Chimes Building. The New York State Supreme Court for Onondaga County (Mead, J.) granted an Order on March 31, 1967 appointing a Receiver for the benefit of CIC to receive all rents and profits then due or to become due, pending the foreclosure action.

On July 5, 1967, this Court granted leave to the Receiver to intervene in this proceeding and be made a party defendant, and ordered payment to the Receiver of the sum of $76,850 on deposit, to be credited against the sum fixed and determined by final order and judgment of this Court as just compensation for the taking of the property.

On May 26, 1967, the United States elected to renew its leasehold on portions of the Chimes Building for an additional 6 months from July 1, 1967 to Dec. 31, 1967, and on June 14, 1967 deposited the sum of $76,850 in the Court, which represented the estimated compensation for the right to use and occupy for the additional period.

A stipulation was entered into on October 16, 1937 among the United States, the Receiver, SID, and the Equitable Life Assurance Society of the United States (hereafter

"Equitable"), to the effect that (1) the United States continue to occupy the premises until November 30, 1967 (instead of the period previously elected by the plaintiff, and that (2) an order should be entered directing the Clerk to pay the Receiver, out of the $76,850 deposited in the Court, the sum of $64,041.65 as rental for the period of July 1, 1967 to November 30, 1967, said sum to be credited against the just compensation to be fixed.[2] Based on the stipulation, an Order dated and entered October 18, 1968 directed payment of $64,041.65 to the Receiver, said sum to be applied against just compensation.

Pursuant to an agreement between SID and CIC, CIC accepted a deed to the Chimes Building from SID, recorded October 17, 1967, in lieu of foreclosure. As part of the transaction, CIC paid $10,000.00 to SID, and SID, "for the purpose of affecting a transfer to City Investing Company of all our right, title and interest in and to [Chimes Building], including all the rents due and to become due for the use and occupancy of said real property," executed a written assignment dated October 2, 1967, the pertinent parts of which are set forth in full in the footnote below.[3]

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[2] The parties, including SID, fixed the sum to be paid the Receiver "as rental" for the 5 months period at 5/6 of the amount deposited as just compensation for a six month period.

[3] The Assignment, in pertinent part, reads as follows:

[SID does] hereby assign to said CITY INVESTING COMPANY, its successors and assigns, all of our right, title and interest in and to any sum of money found to be due from the United States of America resulting from the condemnation by the United States of America of a portion of said real property, which condemnation is now pending in the United States District Court for the Northern District of New York under the following title:

(Footnote continued on following page)

Appendix G. United States v. Certain Space, 320 F.S. 491 affirmed per curiam 435 F(2) 872, Certiorari denied 402 U.S. 908 (Related Case).

On November 28, 1967, the foreclosure action in the State Supreme Court was dismissed, the notice of pendency cancelled, the Receivership terminated, and the Receiver was directed to surrender possession of the premises to CIC and settle his account as said Receiver.

The defendants Irving Trust Company and James A. Austin were the holders, as trustees, of a consolidated second mortgage lien; they assigned said mortgage to CIC by an instrument dated March 27, 1967 and recorded on March 30, 1967, and by reason thereof have no further interest in this proceeding.

The defendant Equitable was, prior to January 1, 1967 and subsequent to November 30, 1967, the holder of a consolidated first mortgage lien covering the Chimes Building.

(Footnote continued from preceding page)

[giving caption of 66-CV-483], and we empower said CITY INVESTING COMPANY in its own name or in our names to do and perform all acts, matters and thing touching the premises in like manner to all interests and purposes, and, if necessary, to bring appropriate proceedings in said condemnation for the substitution of itself in our place as defendant in said action for the purpose of recovering to its own use all sums found to be due and owing from the United States of America by reason of such condemnation.

We covenant that we will not at any time hereafter take any steps whereby the monies found to be due and owing from the United States of America as a result of any adjudication, award or settlement of Civil Action No. 66CV-483 or any part thereof shall be paid to us except for the purpose of transmitting the same by endorsement or otherwise to CITY INVESTING COMPANY, nor will we do any act whereby CITY INVESTING COMPANY, its successors or assigns, may be prevented or hindered from enforcing payment of the same; we further covenant that we and all persons claiming under us, including our heirs, executors and assigns, shall and will, from time to time, or at any time hereafter execute such further assurances for effectually assigning the said monies found to be due and owing from the United States of America to CITY INVESTING COMPANY, its successors or assigns, as it or they or it or their counsel in law shall require.

Appendix G. United States v. Certain Space, 320 F.S. 491 affirmed per curiam 435 F(2) 872, Certiorari denied 402 U.S. 908 (Related Case).

CONTENTIONS OF THE PARTIES

SID's opposition to CIC's motion is three-pronged: (1) CIC derived no rights under the October 2, 1967 assignment because it "is void and of no force and effect" pursuant to the provisions of the Anti-Assignment Act (31 U.S.C. § 203), and (2) SID has restoration claims arising out of a lease which terminated on December 31, 1966, which the stipulation of September 30, 1968 and the order sought herein purport to include, and (3) that SID has a "residual interest in these proceedings" by reason of a letter dated September 14, 1967 attached to its answering affidavit,[4] which it claims reserved

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[4] That letter, from CIC to SID, reads as follows:

September 14, 1967

Messrs. Walter J. Sampson,
Bernard Greenbaum, Abner J. Mesirow
and Arthur A. Bogeaus, Co-Partners,
doing business as
SOUTHEASTERN INDUSTRIAL DISTRICT,
799 Elm Street,
Winnetka, Illinois.

Gentlemen:

With reference to the sale by you to us of property situated in the City of Syracuse, New York, including the building known as the Chimes Building, and the assignment by you to us of all rents due and to become due for the use and occupancy of said property, including all sums found to be due from the United States of America, resulting from the condemnation by the United States of America of a portion of said real property, which condemnation is now pending in the United States District Court for the Northern District of New York as Civil Action No. 66-CV-483, we understand and agree that such assignment does not include any claims, rights or damages which you may have against the United States of American or any of its sub-divisions or bureaus for compensation in lieu of restoration and rehabilitation which may be due to you, as Landlord, with respect to the

(Footnote continued on following page)

from the assignment its claim for restoration damages under the lease expiring December 31, 1966, and a claim for "loss of equity which [it] may have sustained resulting from any wrongful or arbitrary use of the power of condemnation."

CIC takes the position that it is entitled to the entire award by reason of the assignment; that the parties, in negotiating, were aware of the rights accruing to the United States under the Anti-Assignment Act and to protect against the possible assertion of that statute by the Government, the last paragraph of the assignment was added, which constitutes a separate and severable agreement under which SID should be equitably estopped from asserting any objection to the payment of CIC.

(Footnote continued from preceding page)

Chimes Building, in accordance with the provisions of the lease dated December 3, 1946, between Onondaga Holding Corp. and the United States of America and any extensions thereof or agreements supplemental thereto.

We further understand and agree that such assignment does not include any claims, rights or damages which you may have for compensation, award or settlement from the United States of America or any of its subdivisions or bureaus for loss of equity which you may have sustained resulting from any wrongful or arbitrary use of the power of condemnation.

Said claims, rights or damages for compensation in lieu or (sic) restoration or rehabilitation and for loss of equity are reserved to you and are distinguished from any right to compensation payable by the United States of America as rent for the use and occupancy of the Chimes Building, pursuant to its condemnation proceeding, designated as Civil Action No. 66-CV-483.

Very truly yours,

CITY INVESTING COMPANY,
/s/ HOWARD F. NOONAN,
Howard F. Noonan.

The problem, apparently, has its genesis in the use of the terms "rents" and "just compensation" interchangeably by the parties.[5]

As long as judgment is entered in accord with the stipulation of September 30, 1968, the Government has agreed not to assert the Anti-Assignment Act and defendant Equitable has waived its right to lay claim to any part of the

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[5] For example, (see fn. 2 also) the affidavit of Edgar T. Mengarelli, the Receiver of the Chimes Building property, made in support of a motion for an order directing the Clerk to make a rental payment to him, and sworn to on September 22, 1967, contains the following language of interest:

"***on June 14, 1967, there was deposited by the plaintiff with the Clerk of this Court as estimated just compensation for the estates, rights and interest as more particularly set forth in the Declaration of Taking, the Complaint and the Notice of Election to Renew herein, the sum of Seventy-six Thousand Eight Hundred Fifty Dollars ($76,850.00), which sum was alleged by the plaintiff to represent the estimated just compensation for said additional taking and for the use of said property for the renewal period beginning July 1, 1967, and ending December 31, 1967." *Affidavit*, page 2.

and:

"That said deposit made by the plaintiff with the Clerk of this Court on June 14, 1967, constitues rent for the use and occupancy of the premises described in the Complaint herein and that your deponent, as Receiver as aforesaid, is entitled thereto for the reasons set forth in deponent's affidavit sworn to April 26, 1967, in support of deponent's motion to obtain the first deposit, which motion was granted; a true copy of said affidavit of April 26, 1967, is annexed hereto, made a part hereof and marked Exhibit 'D'." *Affidavit*, page 3.

Further, the affidavit requested an order directing payment of "the sum of $44,402.15, being the rent for the use and occupancy of said premises for the period from July 1, 1967, to October 14, 1967, based upon plaintiff's estimate of just compensation for the use and occupancy of said premises for the period from July 1, 1967, to December 31, 1967, without prejudice to deponent's right to have ascertained the just compensation for the taking herein. Dated: September 22, 1967." *Affidavit*, page 4.

just compensation. However, if SID has some residual rights left under the assignment, Equitable, in that case, asserts that it becomes entitled to them under the condemnation clause found in its first mortgage.

[1] SID's assertion that the assignment is void is without merit. The Anti-Assignment Act is for the government's protection and only the United States may assert it. See, e. g., Martin v. National Surety Co., 300 U.S. 588, 57 S.Ct. 531, 81 L.Ed. 822 (1937); McKenzie v. Irving Trust Co., 323 U.S. 365, 65 S.Ct. 405, 89 L.Ed. 305 (1945); Segal v. Rochelle, 382 U.S. 375, 86 S.Ct. 511, 15 L.Ed.2d 428 (1966); Toles v. United States, 371 F.2d 784 (10th Cir. 1967); and United Pacific Insurance Co. v. Timber Access Industries Co., 277 F. Supp. 925 (D.Ore.1967).

SID contends that by CIC's letter of September 14, 1967,[6] any restoration claims existing at the end of the period of taking (November 30, 1967), and a "claim for loss of equity," were excluded from the assignment. However, in the course of the oral argument and in the chamber conferences, it was recognized by all the parties that any restoration claims existing by reason of the lease expiring on December 31, 1966 were not affected by this action, and that the restoration damages for the eleventh-month period covered by this section were inconsequential. Further, the letter of September 14, 1967 clearly refers to restoration damages under the lease of December 3, 1946, and extensions thereof which expired on December 31, 1966.

[2] SID has not explained what the claimed "loss of equity" constitutes, or whether it is a cognizable element in

[6] See footnote 4, supra.

the fixing of just compensation. In any event, such damages would not be considered independently, if at all, in determining just compensation. See United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1956) and Kimball Laundry Co. v. United States, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949); but cf. United States v. Certain Land at Irving Place & 16th St., 415 F.2d 265 (2d Cir. 1969).

To support its contention that "loss of equity" was reserved from the assignment, SID relies upon the specific exclusions from the assignment found in the letter of September 14, 1967 from CIC to SID, (see fn. 4).

[3] Whether reserved from the assignment or not seems to be of small moment, since by its own terms the "loss of equity" damage is limited to that *"resulting from any wrongful or arbitrary use of the power of condemnation"*, in effect, equivalent to a physical seizure without a condemnation proceeding and a claim over which the Court of Claims and not this court would have exclusive jurisdiction. Myers v. United States, 323 F.2d 580, 583 (9th Cir. 1963), see also, United States v. Dow, 357 U.S. 17, 21, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958) (emphasis added).

[4, 5] All the previous correspondence cited by the parties as indicative of their intention, was integrated in the subsequently executed assignment. Accordingly, it is only the assignment which determines the rights of the parties. See Restatement of Contracts, §§ 237 et seq., 4 Williston on Contracts, §§ 631 et seq. (3rd Ed. 1961), Richardson on Evidence, §§ 578 et seq. (9th Ed. 1964). Further, the assignment was without reservation of any kind, and SID assigned to CIC "all of our right, title and interest in and to any sum of money

found to be due from the United States of America resulting from the condemnation by the United States of America ***."

Even if SID had some residual rights left under the assignment, Equitable, as noted earlier, asserts that it becomes entitled to them under the condemnation clause[7] in its first mortgage. This stands as a further bar to SID's claim.

The effect of the assignment by SID to CIC and the condemnation clause in SID's first mortgage with Equitable, leaves SID without any interest in the condemnation award. The rights or remedies of SID outside of the award, if any, remain undisturbed.

Under the circumstances, the motion of the petitioner CIC is granted as hereinafter provided, and it is

[7] That clause reads as follows:

> 20. The party of the second part for themselves, their heirs, legal representatives, successors and assigns, does hereby assign to said party of the first part, its heirs, legal representatives, successors and assigns any and all awards heretofore made and hereafter to be made to the present and all subsequent owners of the mortgaged premises, including any award and awards for change of grade of any street affecting said mortgage premises, and said party of the first part, its heirs, legal representatives, successors and assigns is hereby authorized and empowered to collect and receive such award and awards and to give proper receipts and acquittances therefor, and to apply the same toward the payment of the amount owing on said bond and mortgage, notwithstanding the fact that the amount owing on said bond and mortgage may not then be due and payable, and said party of the second part for themselves, their heirs, legal representatives, successors and assigns covenants and agrees with said party of the first part, its heirs, legal representatives, successors and assigns upon request to make, execute and deliver any and all assignments and other instruments sufficient for the purpose of assigning said award and awards to the holder of said bond and mortgage, free, clear and discharged of any encumbrances of any kind or nature whatsoever.

ORDERED that City Investing Company a New York corporation with its principal place of business at 980 Madison Avenue, New York, New York, be and it hereby is joined as a party defendant in this action, and the notice, complaint and the proceedings herein are amended accordingly; and it is further

ORDERED that summary judgment be granted herein:

(1) Condemning the premises described in Schedule "A" of the Complaint herein to the extent of the estate set forth therein, and

(2) Fixing the total just compensation to be paid by the United States of America for the taking of the rights and interests herein, as the same are more particularly described in the Complaint and all of the proceedings filed herein in the sum of $178,700.00, which sum includes interest, and

(3) Decreeing that the petitioner CIC is entitled to said just compensation and that no other party to this action is entitled to any part of said just compensation, and

(4) That the sum of $140,891.65 previously withdrawn from the Registry of the Court by and paid to Edgar T. Mengarelli, as Receiver, pursuant to Orders of this Court filed herein on July 10, 1967 and October 18, 1967, be credited against the just compensation herein granted, leaving a balance of $37,808.35 to be paid by the condemnor, the plaintiff herein, and

(5) That judgment in the sum of $37,808.35 be entered in favor of City Investing Company against the United States of America.

Appendix H. 1954 Mortgage Agreement between Equitable and SEID

AGREEMENT made the first day of April nineteen hundred and fifty-four, between THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a corporation organized and existing under the Laws of the State of New York, having its principal office at No. 393 Seventh Avenue, New York 1, New York, hereinafter designated as the party of the first part, and WALTER J. SAMPSON, residing at 710 Junior Terrace, Chicago, Illinois, BERNARD GREENBAUM, residing at Shoreland Hotel, 5454 South Shore Drive, Chicago, Illinois, ABNER J. MESIROW, residing at 3100 North Sheridan Road, Chicago, Illinois, and ARTHUR A. BOGEAUS, residing at 1425 Sheridan Road, Highland Park, Illinois, CO-PARTNERS, DOING BUSINESS AS SOUTHEASTERN INDUSTRIAL DISTRICT, hereinafter designated as the party of the second part, WITNESSETH that

WHEREAS, the party of the second part is now the owner in fee simple of the following described premises, together with the buildings and improvements thereon erected, situate, lying and being in the City of Syracuse, County of Onondaga, State of New York, bounded and described as follows:

BEGINNING at a point on the Westerly side of South Salina Street distant 214.33 feet Northerly from the corner formed by the intersection of the Westerly side of South Salina Street and the Northerly side of West Adams Street; running thence South 72 degrees 28 minutes 00 seconds West 264.34 feet to the Easterly side of South Clinton Street; thence along the Easterly side of South Clinton Street North 17 degrees 31 minutes 00 seconds West 57.75 feet to the Southerly side of the right of way; thence along the Southerly side of the right of way North 72 degrees 28 minutes East 93.40 feet; North 71

degrees 14 minutes 50 seconds East 30 feet to the Easterly side of said right of way; thence North 17 degrees 28 minutes 30 seconds West 51.9 feet to the Northerly side of said right of way; thence along the Northerly side of said right of way South 72 degrees 28 minutes West 30.48 feet; thence North 17 degrees 28 minutes 30 seconds West 83.10 feet to the Southerly side of West Onondaga Street; thence along the Southerly side of West Onondaga Street North 44 degrees 18 minutes 50 seconds East 194.80 feet to the corner formed by the intersection of the Southerly side of West Onondaga Street and the Westerly side of South Salina Street; thence along the Westerly side of South Salina Street South 17 degrees 28 minutes 30 seconds East 285.62 feet to the point or place of BEGINNING.

TOGETHER with an Easement of an unrestricted right of way over and along the alley or strip of land described as follows:

BEGINNING at a point in the East line of South Clinton Street distant 86.04 feet Southerly measured along the East line of South Clinton Street from its intersection with the Southerly line of West Onondaga Street as widened; thence North 72 degrees 28 minutes East 93.4 feet; thence North 71 degrees 13 minutes 30 seconds East 29.91 feet to the Southwest corner of land now or formerly owned by Hurwitz; thence North 17 degrees 28 minutes 30 seconds West along the West line of said Hurwitz property 51.93 feet to the South line of lands of Geo. A. Hagaman; thence South 72 degrees 28 minutes West along said Hagaman's South line and lands now or formerly owned by Fowler about 30.48 feet to said Fowler's Southwest corner; thence South 17 degrees 13 minutes

East 40.58 feet to the North line of a right of way; thence South 72 degrees 28 minutes West along the North line of said right of way 92.65 feet to the East line of South Clinton Street; thence South 17 degrees 31 minutes East along said East line of South Clinton Street, 12 feet to the place of BEGINNING.

TOGETHER with all right, title and interest of the party of the second part of in and to the land lying in the streets and roads in front of and adjoining said premises.

WHEREAS, the party of the first part is the holder of

(a) a certain bond conditioned for the payment of ONE MILLION TWO HUNDRED THOUSAND ($1,200,000.00) DOLLARS made by Hub City Realty Corporation to Metropolitan Life Insurance Company, dated August 22, 1929, which said bond is secured by a mortgage bearing even date therewith and recorded in the Office of the Clerk of the County of Onondaga on August 31, 1929 in Liber 750 page 461 of Mortgages, and

(b) another certain bond conditioned for the payment of SIX HUNDRED THOUSAND ($600,000.00) DOLLARS made by James E. Heffernan and Blanche O. Heffernan, his wife, to The Syracuse Trust Company, dated March 20, 1928, which said bond is secured by a mortgage bearing even date therewith and recorded in the Office of the Clerk of the County of Onondaga on March 20, 1928 in Liber 725 page 129 of Mortgages, which said mortgages were consolidated and spread so as to constitute one first mortgage lien by agreement recorded in Liber 1310 page 633 of Mortgages, on which there is now due the sum of ONE MILLION THREE HUNDRED SIXTY-FIVE THOUSAND THREE HUNDRED SEVENTY-FIVE ($1,365,375.00) DOLLARS, and

which consolidated mortgage is now a valid lien on a portion of the premises hereinabove described, and

WHEREAS, the party of the first part is also the holder of a certain bond conditioned for the payment of TWO HUNDRED EIGHTY-FOUR THOUSAND SIX HUNDRED TWENTY-FIVE ($284,625.00) DOLLARS, made by the party of the second part to the party of the first part, dated the first day of April 1954 and which bond is secured by a mortgage bearing even date therewith and intended to be recorded in the Office of the Clerk of the County of Onondaga, and which mortgage is now a valid lien on the premises hereinabove described, and

WHEREAS, the party of the second part is now indebted to the party of the first part in the principal sum of ONE MILLION SIX HUNDRED FIFTY THOUSAND ($1,650,000.00) DOLLARS, lawful money of the United States, with interest thereon at the rate of four and one-quarter (4¼%) per centum per annum from the date hereof, secured by the aforesaid bonds and mortgages held by the party of the first part, and

WHEREAS, the parties hereto desire to spread the lien of the mortgages recorded in Liber 750 page 461 of Mortgages and Liber 725 page 129 of Mortgages so that they shall cover and be a lien upon the premises hereinbefore described in addition to the premises described in said mortgages and to extend the payment of the principal sum thereby secured with interest as hereinafter provided, and further desire to consolidate and coordinate the liens of all of the mortgages hereinabove described so that the same shall together constitute in law but one joint first mortgage lien upon the premises hereinbefore described, securing the payment of said principal indebtedness of ONE MILLION SIX HUN-

DRED FIFTY THOUSAND ($1,650,000.00) DOLLARS and interest thereon as aforesaid, to be paid as hereinafter provided.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements of the parties herein contained and of other good and valuable considerations and of the sum of One Dollar, lawful money of the United States, to each party by the other in hand paid, receipt whereof is hereby acknowledged, and for the purpose of carrying out the intention above expressed, the parties hereby covenant and agree as follows:

That the lien of the mortgages recorded in Liber 750 page 461 of Mortgages and Liber 725 page 129 of Mortgages shall be spread, extended and imposed so that they shall cover and be a lien upon the premises first hereinabove described in addition to the premises described in said mortgages, and the principal sum secured thereby, together with interest thereon shall be payable as hereinafter provided, and that all of the said mortgages hereinbefore described be and the same hereby are consolidated and coordinated so that the same shall and now do constitute a joint first mortgage lien upon all the premises hereinbefore described, securing the principal sum of ONE MILLION SIX HUNDRED FIFTY THOUSAND ($1,650,000.00) DOLLARS and interest, to be paid as hereinafter provided, and

That the liens of the said mortgages as so spread, consolidated and coordinated, shall be deemed and construed from the date hereof to run concurrently as one mortgage and lawfully constitute a valid single first mortgage lien upon all the premises hereinabove described, securing the principal sum of ONE MILLION SIX HUNDRED FIFTY THOUSAND ($1,650,000.00) DOLLARS with interest as hereinafter

provided, with the same force and effect as if the party of the first part was the holder of a single bond and a single first mortgage made, executed and delivered by the party of the second part to the party of the first part covering the premises hereinabove described, securing the payment of said principal sum with interest as aforesaid.

Upon the aforesaid consideration the party of the first part extends the time of payment of such part of the principal indebtedness secured by the bonds and mortgages recorded in Liber 750 page 461 of Mortgages and Liber 725 page 129 of Mortgages, on which there is unpaid the principal sum of ONE MILLION THREE HUNDRED SIXTY-FIVE THOUSAND THREE HUNDRED SEVENTY-FIVE ($1,365,375.00) DOLLARS, and modifies the manner of payment of the entire principal indebtedness of ONE MILLION SIX HUNDRED FIFTY THOUSAND ($1,650,000.00) DOLLARS secured by said bonds and mortgages as combined and consolidated, as hereinabove provided (hereinafter called "bond" and "mortgage") so that said entire principal indebtedness of ONE MILLION SIX HUNDRED FIFTY THOUSAND ($1,650,000.00) DOLLARS together with interest thereon shall be payable in lawful money of the United States which shall be legal tender for the payment of all public and private debts at the time of payment, at its office in New York City, New York, or at such other place as the party of the first part or its successors or assigns may, from time to time designate in writing, as follows:

In quarter-annual installments of ELEVEN THOUSAND THREE HUNDRED FIFTY ($11,350.00) DOLLARS each, commencing on the first day of June, 1954, and continuing thereafter on the first days of Sep-

tember, December, March and June in each year until the first day of March, 1965, when the entire unpaid balance of said principal sum shall be due and payable, with interest on said principal sum of ONE MILLION SIX HUNDRED FIFTY THOUSAND ($1,650,000.00) DOLLARS, or so much thereof as may from time to time remain unpaid, computed from the date hereof at the rate of four and one-quarter (4-¼%) per centum per annum and to be paid on the first day of June next ensuing, and quarter-annually thereafter.

The privilege is reserved on the first regular instalment due date in the second loan year and on any regular instalment due date thereafter, of partially prepaying the principal hereof without charge, but after thirty days' written notice to the party of the first part, provided, however, that such prepayments shall be made only in multiples of ONE THOUSAND ($1,000.00) DOLLARS and shall not exceed in the aggregate in any one loan year the sum of ONE HUNDRED SIXTY-FIVE THOUSAND ($165,000.00) DOLLARS. All such prepayments shall be applied on account of the net balance of principal then remaining unpaid but shall not affect the amounts of nor the dates for the payment of any regular instalment until the entire indebtedness is fully paid. The further and additional privilege is reserved, on the first regular instalment due date in the second loan year and on any regular instalment due date thereafter, upon thirty days' written notice in instances of partial prepayment and sixty days' written notice in the event of full prepayment, of prepaying on account of the principal sum hereby secured amounts in excess of ONE HUNDRED SIXTY-FIVE THOUSAND ($165,000.00) DOLLARS in any one loan year and with the payment of a charge for such privilege of one (1) per cent of the amount so prepaid, if such prepayment is

made prior to end of the sixth loan year and without premium charge if prepaid thereafter. The further privilege is reserved during the first loan year, upon sixty days' written notice to the party of the first part, of prepaying the principal hereof in full, in the event that the premises covered by said mortgage are conveyed to the United States of America, and with the payment of a charge for such privilege equal to one (1) per cent of the principal balance thereof remaining unpaid, plus interest on the amount of such principal balance to a date which shall constitute the end of the first loan year. Anything contained herein to the contrary notwithstanding, no default shall be deemed to exist by reason of the nonpayment of the quarterly principal instalments accruing during any period so long as the amount of the prepayments theretofore made and not previously applied equals or exceeds the amount of such required instalments for such period. The term "loan year" for the purposes hereof shall be deemed and construed to mean any annual period commencing on the first regular instalment due date hereunder or on any anniversary of such date. On and after the date fixed for the prepayment of any such additional amounts of the principal sum, notice of such intention having been given as herein provided, such additional principal sum and the applicable prepayment premium shall become due and payable on the date so designated and shall be paid on said date. (See Rider "A").

The principal indebtedness or any principal instalment thereof shall bear interest at the rate of six (6) per centum per annum, if not paid when due.

It is convenanted and agreed that the party of the second part shall be under no personal liability under this agreement or the bond secured thereby. The holder of this single first mortgage lien shall look exclusively to the mortgaged

Appendix H. 1954 Mortgage Agreement between Equitable and SEID.

premises for payment of the indebtedness secured hereby and performance of the provisions hereof, and shall not seek a deficiency or other money judgment against the party of the second part in any action or proceeding brought on this single first mortgage lien or the bond which it secures.

That in the event of loss or destruction of any building less than two stories in height the party of the second part shall have the option of rebuilding or not rebuilding the same. If said party of the second part does rebuild then the party of the first part will turn over to it the insurance proceeds to apply against reconstruction. If the party of the second part does not rebuild then the proceeds of said insurance will be credited against the mortgage debt. In the event of damage to or partial destruction of such building, when the same is repaired, the party of the first part will turn over to the party of the second part any insurance proceeds received in connection therewith, otherwise said insurance proceeds will be credited against the mortgage debt. Any proceeds of insurance, to be paid over as above provided, shall be paid over only in the event that there shall be no default on the part of the party of the second part under the terms and provisions of this agreement, and on certificate of an architect approved by the party of the first part and then only, during construction, up to 80% of the cost of such construction.

The party of the first part hereby agrees for itself, its successors and assigns, at the cost and expense of the party of the second part, or any subsequent owner of the mortgaged premises, to execute and deliver instruments in writing releasing the portions of the mortgaged premises hereinafter described, upon payment of the sums of money and upon the terms and conditions hereinafter set forth:

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Parcel "A"

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the City of Syracuse, County of Onondaga, State of New York, bounded and described as follows:

BEGINNING at a point on the westerly side of South Salina Street distant 214.33 feet northerly from the corner formed by the intersection of the westerly side of South Salina Street and the northerly side of West Adams Street; running thence South 72 degrees 28 minutes 0 seconds West 264.34 feet to the easterly side of South Clinton Street; thence along the easterly side of South Clinton Street North 17 degrees 31 minutes 00 seconds West 57.75 feet to the southerly side of a right of way; thence along the southerly side of said right of way North 72 degrees 28 minutes 0 seconds East 93.40 feet; thence North 71 degrees 14 minutes 50 seconds East 171.03 feet to the westerly side of South Salina Street; thence South along the westerly side of South Salina Street 61.50 feet to the point or place of BEGINNING.

Upon payment of the sum of TWO HUNDRED THOUSAND ($200,000.00) DOLLARS, together with interest thereon to the date of payment.

Parcel "B"

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the City of Syracuse, County of Onondaga, State of New York, bounded and described as follows:

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BEGINNING at a point on the westerly side of South Salina Street distant 275.83 feet northerly from the corner formed by the intersection of the westerly side of South Salina Street and the northerly side of West Adams Street; running thence South 71 degrees 14 minutes 50 seconds West 141.03 feet; thence North 17 degrees 28 minutes 30 seconds West 63.4 feet; thence North 72 degrees 28 minutes 0 seconds East 30 feet; thence North 17 degrees 28 minutes 30 seconds West 8 feet; thence North 72 degrees 28 minutes 0 seconds East 111.07 feet to the westerly side of South Salina Street; thence southerly along the westerly side of South Salina Street 68.58 feet to the point or place of BEGINNING.

Upon payment of the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS, together with interest thereon to the date of payment.

Parcel "C"

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the City of Syracuse, County of Onondaga, State of New York, bounded and described as follows:

BEGINNING at a point on the southerly side of West Onondaga Street distant 126.04 feet westerly from the corner formed by the intersection of the southerly side of West Onondaga Street and the westerly side of South Salina Street, running thence South 17 degrees 28 minutes 30 seconds East 104.03 feet; thence South 72 degrees 28 minutes 0 seconds West 30 feet; thence South 17 degrees 28 minutes 30 seconds East 11.5 feet; thence South 72 degrees 28 minutes 0 seconds West 30.48 feet; thence

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North 17 degrees 28 minutes 30 seconds West 83.1 feet to the southerly side of West Onondaga Street; thence easterly along the southerly side of West Onondaga Street 68.76 feet to the point or place of BEGINNING.

Upon the payment of the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS, together with interest thereon to the date of payment.

which said release or releases, however, shall reserve for the benefit of the premises retained under the lien of the mortgage any and all easements appurtenant thereto. Provided, however, that the party of the second part shall give to the party of the first part sixty (60) days written notice of the release or releases so desired and provided in respect to each of said releases that the party of the second part shall pay, in addition to the sum hereinabove provided, with interest, a charge of one (1) per cent of said principal sum, and further provided that the party of the first part, its successors or assigns, shall not be required to execute and deliver any release of any portion of the mortgaged premises while the party of the second part or any subsequent owner thereof is in default as to any of the terms, conditions, covenants or payments provided for herein and upon the further condition that any instrument of release shall be prepared by the attorney for the party of the first part, its successors or assigns, at the cost of the party of the second part or any subsequent owner of the mortgaged premises, (See Rider "B").

AND the party of the second part in consideration of the above extension and modification and of one dollar paid by the party of the first part and other valuable consideration, the receipt whereof is hereby acknowledged, does hereby covenant and agree to pay said principal sum and interest as

above set forth, and to comply with the other terms of said bonds and consolidated mortgage, as herein modified.

The party of the first part and the party of the second part hereby certify that this instrument secures the same indebtedness secured by the said bonds and mortgages hereinabove described, consolidated under the terms of this agreement, namely, the principal sum of ONE MILLION SIX HUNDRED FIFTY THOUSAND ($1,650,000.00) DOLLARS, and interest, as aforesaid, and secures no further or other indebtedness or obligation.

The party of the second part in consideration of the above spreader, consolidation and extension and of one dollar paid by said party of the first part, receipt whereof is hereby acknowledged, does hereby covenant and agree with the party of the first part as follows:

1. That the party of the second part will pay the indebtedness as hereinbefore provided.

2. That the party of the second part warrants the title to the premises.

3. That no building on the premises shall be altered, removed or demolished without the consent of the party of the first part.

4. That the party of the second part will pay all taxes, assessments and water rates and in default thereof the party of the first part may pay the same.

5. That the party of the second part will keep the buildings on the said premises insured against loss by fire and the associated risks covered by the so-called standard Extended Coverage Endorsement for the benefit of the party of the first part, and will, on demand, obtain war risk or similar hazard

insurance as the party of the first part may require; that they will assign and deliver the policies to the mortgagee; and that they will reimburse the mortgagee for any premiums paid for insurance made by the mortgagee on the mortgagors' default in so insuring the buildings or in so assigning and delivering the policies. The party of the first part is authorized, at its option, to collect, adjust and compromise any loss under any policies on said property and to apply the net proceeds at its option, either as a credit on the mortgage debt or to restoring the improvements, or to deliver the same to the owner of said mortgaged premises.

6. That the party of the second part will, upon ten days' written demand by the party of the first part, deliver to said party of the first part, receipted bills showing the payment of all taxes, assessments and water rates and if such receipted bills are not delivered within said ten days, then all taxes, assessments and water rates appearing to be unpaid on the books of any officer for the collection of any such items shall be conclusively deemed to be unpaid and all defenses of payment of any such items are hereby waived.

7. That the whole of said principal sum and interest shall become due at the option of the party of the first part after default in the payment of any instalment of principal on its due date, or after default in the payment of interest for fifteen days, or after default in the payment of any tax, assessment or water rate (including future instalments of assessments confirmed whether said future instalments are liens or not) as the same become payable, anything hereinbefore contained to the contrary notwithstanding, or immediately upon the actual or threatened alteration, demolition or removal of any building standing on the mortgaged premises or after default after notice and demand

either in assigning and delivering the policies insuring the buildings against loss by fire or in reimbursing the mortgagee for premiums paid on such insurance, as hereinbefore provided; or after default upon request in furnishing a statement of the amount due on the mortgage and whether any offsets or defenses exist against the mortgage debt, as hereinafter provided.

7a. That the whole of said principal sum shall become due at the option of the party of the first part, in the event that any building shall be hereafter erected, whether by the party of the second part of its successors and assigns, on either or both of the parcels of land designated as Parcels "B" and "C", hereinabove described, which shall be more than two stories in height or shall exceed a height of 25 feet (including cornice and parapet) above curb level, upon giving to the party of the second part or any subsequent owner of the mortgaged premises sixty (60) days written notice of its election so to do.

8. That in the event of a foreclosure of said mortgage said premises may be sold in one parcel, any provision of law to the contrary notwithstanding.

9. The rents, issues and profits of said mortgaged premises are hereby transferred and assigned to the party of the first part as further security for the payment of said indebtedness, and the party of the second part, for themselves, their heirs, legal representatives, successors and assigns, grants to the party of the first part license to enter upon said premises for the purpose of collecting the same and to let said premises or any part thereof, and to apply the rents, issues and profits, after payment of all necessary charges and expenses, on account of said indebtedness. This assignment and grant shall continue in effect until said mortgage is paid. The party of the first part hereby waives the right to enter upon

said premises for the purpose of collecting said rents, issues and profits, and the party of the second part and any subsequent owner of said premises shall be entitled to collect and receive said rents, issues and profits until default under the covenants, conditions and agreements contained in said bond, mortgage, and in this agreement, and the party of the second part covenants to use such rents issues and profits in payment of principal and interest becoming due on said mortgage and in payment of taxes and carrying charges becoming due against said premises, but such right of the party of the second part and any subsequent owner to collect said rents, issues and profits may be revoked by the party of the first part upon any default, on five days' written notice. The party of the second part covenants that he will not, without the written consent of the party of the first part, receive or collect rent from any tenant of said premises or any part thereof for a period of more than one month in advance, and, in the event of any default under said bond, mortgage or this agreement will pay monthly in advance to the party of the first part, or to any receiver appointed to collect said rents, issues and profits, the fair and reasonable rental value for the use and occupation of said premises or of such part thereof as may be in the possession of the party of the second part, and upon default in any such payment will vacate and surrender the possession of said premises to the party of the first part. The words "successors and assigns" includes, but is not limited to, subsequent owners of said mortgaged premises. The covenants contained in this paragraph shall run with the land and bind the party of the second part, his heirs, legal representatives, successors and assigns and all subsequent owners, tenants, sub-tenants and assigns of said premises or any part thereof. That the whole of said principal sum and the interest shall become due at the option of the party of the first

part if the party of the second part fails to keep, observe and perform the covenants and agreements herein contained.

10. That the party of the first part in any action to foreclose said mortgage shall be entitled, without regard to the adequacy of any security for the debt and without notice, to the appointment of a receiver.

11. That in the event of the passage of any law changing in any way the laws for the taxation of mortgages or debts secured by mortgage for state or local purposes, said mortgage shall, at the option of the party of the first part, become due and payable after thirty days' written notice to the party of the second part.

12. That any privilege of prior payment of principal or release privilege contained in said consolidated mortgage or in any extension thereof is hereby abrogated, and that when the terms and provisions in said bond and consolidated mortgage in any way conflict with the terms and provisions of this agreement, the terms and provisions of this agreement shall prevail.

13. If any action or proceeding be commenced (except an action to foreclose said mortgage or to collect the debt secured thereby), to which action or proceeding the party of the first part is made a party, or in which it becomes necessary to defend or uphold the lien of said mortgage, all sums paid by the party of the first part for the expense of any litigation to prosecute or defend the rights and lien created by said mortgage (including reasonable counsel fees), shall be paid by the party of the second part, together with interest thereon at the rate of six (6) per centum per annum, and any such sum and the interest thereon shall be a lien on said premises, prior to any right, or title to, interest in or claim upon siad premises

attaching or accruing subsequent to the lien of said mortgage, and shall be deemed to be secured by said mortgage and by the bond which it secures. In any action or proceeding to foreclose said mortgage, or to recover or collect the debt secured thereby, the provisions of law respecting the recovery of costs, disbursements and allowances shall prevail unaffected by this covenant.

13a. That a substantial portion of the mortgaged premises are leased to The United States of America under lease between Onondaga Holding Corporation and The United States of America dated December 3, 1946, recorded in the Office of the Clerk of Onondaga County on January 5, 1948 in Liber 1311 of Conveyances at Page 249, in respect to which the party of the second part does hereby covenant and warrant to the party of the first part that the party of the second part has not executed any prior assignment of said lease or of their right, title and interest therein or the rentals to accrue thereunder; the party of the second part has not performed any act or executed any instrument which might prevent the party of the first part from operating under any of the terms and conditions hereof, or which would limit the party of the first part in such operation; the party of the second part has not accepted rent under the lease for any period subsequent to the current period for which rent has already become due and payable; there is no default now existing under said lease; and the party of the second part has not executed or granted any modification or amendment whatever of the lease either orally or in writing and that the lease is in full force and effect according to the original terms and conditions thereof; and does hereby agree:

a) To faithfully abide by, perform and discharge each and every obligation, covenant and agreement of

the lease by lessor to be performed; at the sole cost and expense of the party of the second part, to enforce or secure the performance of each and every obligation, covenant, condition and agreement of the lease by the lessee to be performed; not to modify, assign, extend or in any way alter the terms of the lease; not to anticipate the rents thereunder, or to waive, excuse, condone or in any manner release or discharge the lessee thereunder of or from the obligations, covenants, conditions and agreements by the lessee to be performed, including the obligation to pay the rental called for thereunder in the manner and at the place and time specified therein, and the party of the second part does by these presents expressly release, relinquish and surrender unto the party of the first part all the party of the second part's right, power and authority to amend, modify, or in any way alter the terms or provisions of the Lease, and any attempt on the part of the party of the second part to exercise any such right without the written authority and consent of the party of the first part thereto being first had and obtained shall constitute a breach of the terms hereof entitling the party of the first part to declare all sums secured hereby immediately due and payable.

b) At the party of the second part's sole cost and expense to appear in and defend any action or proceeding arising under, growing out of or in any manner connected with the lease or the obligations, duties or liabilities of lessor and lessee thereunder, and to pay all costs and expenses of the party of the first part, including attorney's fees in a reasonable sum in any such action or proceeding in which the party of the first part may appear.

c) That should the party of the second part fail to make any payment or to do any act as herein provided,

then the party of the first part, but without obligation so to do and without notice to or demand on the party of the second part, and without releasing the party of the second part from any obligation hereof, may make or do the same in such manner and to such extent as the party of the first part may deem necessary to protect the security hereof, including specifically, without limiting its general powers, the right to appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of the party of the first part, and also the right to perform and discharge each and every obligation, covenant and agreement of the party of the second part in the lease contained; and in exercising any such powers to pay necessary costs and expenses, employ counsel and incur and pay reasonable attorney's fees. To give prompt notice to the party of the first part of any notice of default on the part of the party of the second part with respect to the lease received from the lessee, together with an accurate and complete copy of any such notice received from the lessee.

d) To pay immediately upon demand all sums expended by the party of the first part under the authority hereof, together with interest thereon at six (6%) per cent per annum, and the same shall be added to the said indebtedness and shall be secured hereby and by the said mortgage.

e) That the party of the second part will not transfer or convey to the lessee the fee title to the demised premises unless the lessee assumes in writing and agrees to pay the debt secured hereby in accordance with the terms, covenants and conditions of the said bond.

13b. That the party of the second part will, in compliance with Section 13 of the Lien Law, receive the advances secured hereby and will hold the right to receive such advances as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

14. That the party of the second part within five days upon request in person or within ten days upon request by mail will furnish a written statement duly acknowledged, of the amount due on said mortgage and whether any offsets or defenses exist against the mortgage debt.

15. That notice and demand or request may be in writing and may be served in person or by mail.

16. That the party of the second part shall be and remain liable for the payment of said principal sum and interest until said indebtedness shall be fully paid notwithstanding any waiver by the party of the first part of any breach of any condition or covenant of said bond, mortgage or this agreement and notwithstanding any action to foreclose said mortgage and/or the settlement and/or discontinuance of such action and regardless of whether the time of payment of said principal sum shall have been extended or the terms modified by such settlement and/or discontinuance.

17. That the lien of said mortgage hereby is extended so as to cover all fixtures, chattels and articles of personal property attached to or used in connection with the mortgaged premises, including but not limited to furnaces, boilers, oil burners, radiators and piping, coal stokers, plumbing and bathroom fixtures, refrigeration, air conditioning and sprinkler systems, wash tubs, sinks, gas and

electric fixtures, stoves, ranges, awnings, screens, window shades, elevators, motors, dynamos, refrigerators, kitchen cabinets, incinerators, and all other equipment and machinery, appliances, fittings and fixtures of every kind in or used in the operation of the buildings standing on said premises, together with any and all replacements thereof and additions thereto, and the whole of said principal sum secured by said bond and mortgage shall become due and payable, at the option of the party of the first part in the event of the removal, demolition or destruction in whole or in part of any of said fixtures, chattels and articles of personal property unless the same are promptly replaced by similar fixtures, chattels and articles of personal property at least equal in quality and condition to those replaced, provided, however, that such substituted fixtures, chattels or articles or personal property be purchased free from any encumbrance and without reservation of title thereto in the seller.

18. That neither the value of the mortgaged premises nor the lien of said mortgage will be diminished or impaired in any way by any act or omission of the party of the second part, and that said party of the second part will not do or permit to be done to, in, upon or about said premises or any part thereof, anything that may in any wise substantially impair the value thereof, or substantially weaken, diminish or impair the security of said mortgage. This covenant shall run with the land and bind the party of the second part, their successors in interest and assigns and all subsequent owners of said premises.

19. That the whole of said principal sum shall be come due at the option of the party of the first part if the buildings on said mortgaged premises are not maintained in reasonably good repair, after notice of the condition of the buildings is

given to the party of the second part, or upon the failure of any owner of said mortgaged premises to comply with the requirements of any governmental department claiming jurisdiction within three months after an order making such requirement has been issued by said Department, or upon the failure of any owner of said premises or any person holding under said owner as tenant, lessee, or otherwise to comply with all statutes, orders, requirements or decrees relating to said premises by any Federal, State or Municipal authority.

20. The party of the second part for themselves, their heirs, legal representatives, successors and assigns, does hereby assign to said party of the first part, its heirs, legal representatives, successors and assigns any and all awards heretofore made and hereafter to be made to the present and all subsequent owners of the mortgaged premises, including any award and awards for change of grade of any street affecting said mortgaged premises, and said party of the first part, its heirs, legal representatives, successors and assigns is hereby authorized and empowered to collect and receive such award and awards and to give proper receipts and acquittances therefor, and to apply the same toward the payment of the amount owing on said bond and mortgage, notwithstanding the fact that the amount owing on said bond and mortgage may not then be due and payable, and said party of the second part for themselves, their heirs, legal representatives, successors and assigns hereby covenants and agrees with said party of the first part, its heirs, legal representatives, successors and assigns upon request to make, execute and deliver any and all assignments and other instruments sufficient for the purpose of assigning and award and awards to the holder of said bond and mortgage, free, clear and discharged of any incumbrances of any kind or nature whatsoever.

And the party of the second part, in consideration of the sum of one dollar paid, and in order to obtain this extension, does hereby covenant and declare to the party of the first part and to any subsequent holder of said mortgage that said mortgage is a valid first lien on the premises therein described for the amount of ONE MILLION SIX HUNDRED FIFTY THOUSAND ($1,650,000.) Dollars, with interest at the rate of 4¼ per centum per annum from April 1, 1954 and that there are no defenses or offsets to said mortgage, nor to the bond which it secures, but all the provisions of said bond and mortgage are unmodified and in force except as the same are modified by this agreement; and the said party of the second part makes this covenant and declaration to induce any subsequent holder of said bond and mortgage to purchase the same in reliance thereon and represents that said party of the second part now owns the premises described in said mortgage.

This agreement shall bind the heirs, executors, administrators, successors and assigns of the respective parties.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals.

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,

By Walter M. Harvey, Jr.,
2nd Vice President,

By J. D. Davis,
Assistant Treasurer.

Appendix H. 1954 Mortgage Agreement between Equitable and SEID.

Walter J. Sampson,
Arthur A. Bogeaus,
Abner J. Mesirow,
Bernard Greenbaum,

CO-PARTNERS, DOING BUSINESS AS
SOUTHEASTERN INDUSTRIAL DISTRICT.

Approved
CMR
EB

RIDERS "A" and "B"

RIDER "A"

Any right of prepayment hereunder may be exercised only so long as there is no default under the bond, mortgage or any other security collateral thereto.

RIDER "B"

and still further provided, in respect to the release of either or both Parcels "B" amd "C", said release or releases shall contain a restriction providing that there shall not be erected on said released premises any building which shall be more than two stories in height or shall exceed a height of 25 feet (including corpice and parapet) above curb level and provided further that upon delivery of said release or releases the owner of the released premises shall enter into an agreement with the party of the first part in form satisfactory to the party of the first part imposing such restriction on the said released premises.

Appendix I. Mortgage Modification Agreement of 1966 between Equitable and SEID.

STATE OF Illinois, } ss.:
COUNTY OF Cook. }

On this 1st day of April, in the year nineteen hundred and fifty-four, before me personally came WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW, and ARTHUR A. BOGEAUS, CO-PARTNERS, DOING BUSINESS AS SOUTHEASTERN INDUSTRIAL DISTRICT, to me known to be the individuals described in and who executed the foregoing instrument, and duly acknowledged to me that they executed the same.

PATRICIA J. ACS,
Notary Public,

My Commission expires May 26, 1956.

Appendix I. Mortgage Modification Agreement of 1966 between Equitable and SEID

THIS AGREEMENT made as of the 1st day of September, 1966, between THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New York corporation, having its principal office at 1285 Avenue of the Americas, New York, New York, hereinafter designated as the party of the first part, and Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow, and Arthur A. Bogeaus, copartners doing business as SOUTHEASTERN INDUSTRIAL DISTRICT, hereinafter designated as the party of the second part.

WITNESSETH:

WHEREAS, the party of the first part is the owner and holder of a Bond secured by a Mortgage made by Hub City

Realty Corporation to Metropolitan Life Insurance Company, recorded August 31, 1929 in Onondaga County Clerk's Office, Liber 750 of Mortgages, page 461; and of a Bond secured by a Mortgage made by James E. Heffernan and Blanche O. Hefferman, his wife, to the Syracuse Trust Company, dated March 20, 1928 and recorded March 20, 1928 in Onondaga County Clerk's Office in Liber 725 of Mortgages, page 129; and of a Bond secured by a Mortgage made by the party of the second part to the party of the first part, dated April 1, 1954 and recorded April 21, 1954 in Onondaga County Clerk's Office; which said Bonds and Mortgages were consolidated, extended and spread by an Agreement between the party of the first part and the party of the second part, dated April 1, 1954, recorded May 3, 1954 in Onondaga County Clerk's Office in Liber 1643 of Mortgages, page 631; which said Bonds and Mortgages as spread, consolidated and extended by the said Agreement are hereinafter referred to as "Bond" and "Mortgage"; and

WHEREAS, by an agreement between the parties made as of March 1, 1965, at which time there was owing and unpaid on the Bond and Mortgage the principal sum of $1,150,600., the time for payment of said balance of the principal sum, together with interest thereon at the interest rate of 6% per annum was extended so that such balance of the principal sum and interest thereon would be due and payable in seventeen (17) successive monthly installments due and payable on the first day of each calendar month, commencing on the first day of May 1965, with the first sixteen (16) installments to be paid in the sum of $9,600. each to be applied first to interest on the balance of the principal sum and the remainder of such installment to be applied to the balance of the principal sum, and the last installment due and payable on September 1, 1966

in the amount of the then remaining balance of the principal sum and interest; and

WHEREAS, as of the date hereof there is due and owing upon the secured Bond and Mortgage the principal balance of $1,087,181.64; and

WHEREAS, the party of the second part is the present owner in fee simple of the mortgaged premises; and

WHEREAS, the parties hereto desire to modify and extend the terms of payment of the Bond and Mortgage and to make certain provisions for the payment of taxes, all as hereinafter provided.

NOW, THEREFORE, in consideration of the premises and of the mutual promises herein contained, it is hereby mutually agreed as follows:

FIRST: That the time for payment of said balance of the principal sum of $1,087,181.64 secured by the Bond and Mortgage, together with interest thereon at the interest rate of 6% per annum, is hereby extended so that such balance of the principal sum and interest thereon shall be due and payable in lawful money of the United States in five (5) successive monthly installments, due and payable on the first day of each calendar month commencing with the first day of September 1966, with the first four (4) installments to be paid in the sum of $12,000. each to be applied first to interest on the balance of the principal sum and the remainder of such installment to be applied to the balance of the principal sum, and the last installment due and payable on January 1, 1967 to be in the amount of the then remaining balance of the principal sum and interest. The payment of the first installment of $12,000. has been made contemporaneously with the execution and delivery of this instrument and the receipt thereof is hereby acknowledged by the party of the first part.

SECOND: That commencing with September 1, 1966 and through and including December 31, 1966, after the payment of all operating expenses incurred in connection with the operation and maintenance of the said mortgaged premises, including, but not limited to, the installments of interest amortization payable to the party of the first part as aforesaid, the rents, issues and profits remaining shall be paid by the party of the second part to the party of the first part who shall hold and apply the same, to the extent such funds are sufficient therefor, for the purposes of making payment of the real estate taxes payable with respect to the mortgaged premises for the calendar year commencing January 1, 1967 when such real estate taxes become due and payable.

The term "rents, issues and profits" referred to in this Paragraph SECOND shall not be deemed to include rent for the month of August 1966, which is payable by the present tenant thereof, the United States Government on or about September 15, 1966, but shall be deemed to include such rent for the month commencing December 1, 1966 even though such rent may not be paid by such tenant until subsequent to December 31, 1966.

The term "operating expenses" referred to in this Paragraph SECOND shall be deemed to include (i) the management fees paid or payable to Eagan Real Estate, Inc. or any successor managing agent; (ii) a management fee of $500. per month payable to Sampson, Bogeaus & Shafer; (iii) travelling expenses, if any, which may be incurred by Sampson, Bogeaus & Shafer, or any of them, in connection with their usual and routine inspection and visitation of the property; and (iv) reasonable attorneys' fees incurred by the

party of the second part in connection with the execution and delivery of this instrument.

The party of the second part agrees further that it will instruct Eagan Real Estate, Inc., or any successor managing agent, upon receipt of the rental from the United States Government and/or any other income from the property that after making payment of, or provision for, the operating expenses for the period covered by this Extension Agreement, to remit the net proceeds of such rental and other income, together with a copy of their usual monthly statement issued in connection therewith, to the party of the first part to be held for the purposes provided for under this Agreement.

THIRD: It is convenanted and agreed that the party of the second part shall be under no personal liability under this Agreement or the Bond secured thereby. The holder of this single First Mortgage lien shall look exclusively to the mortgaged premises for payment of the indebtedness secured hereby and the performance of the provisions hereof, and shall not seek a deficiency or other money judgment against the party of the second part in any action or proceeding brought on this single First Mortgage lien or the Bond which it secures.

This Agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto. Nothing herein contained shall invalidate any of the security now held for said indebtedness or impair any of the conditions of the Bond and Mortgage except as herein specifically provided.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
By R. T. Kist,
Second Vice President.

SOUTHEASTERN INDUSTRIAL DISTRICT,
Arthur A. Bogeaus,
Partner,
Abner J. Mesirow,
Partner,
Walter J. Sampson,
Partner,
Bernard Greenbaum,
Partner.

(Seal)

State of New York,
County of New York. } ss.:

On the 28th day of October, 1966, before me personally came R. T. Kist to me known, who, being by me duly sworn, did depose and say that he resides at 98 Mercer Avenue, Hartsdale, N. Y. that he is the Second Vice President of THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

JOSEPH A. OLIVE,
(Seal) *Notary Public, State of New York,*
Qualified in Queens Co. No. 41-2955015,
Cert. Filed in New York County Clerk Office,
Commission Expires March 30, 1967.

State of Illinois,
County of Cook. } ss.:

On the 15th day of October, 1966, before me personally came WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW and ARTHUR A. BORGEAU, to me known to be the individuals described in and who executed the foregoing instrument, and acknowledged that they executed the same.

(Seal) ERWIN SHAFER

Appendix J. Letter of September, 1967 from City Investing Company to SEID giving restoration award to SEID

CITY INVESTING COMPANY
980 Madison Avenue
New York, N.Y. 10021

Howard F. Noonan
Vice President
and
Treasurer

Telephone
(212) YUkon 8-8000
Cable Address
Cicovest

September 14, 1967

Messrs. Walter J. Sampson,
Bernard Greenbaum, Abner J. Mesirow
and Arthur A. Bogeaus, Co-Partners,
doing business as
SOUTHEASTERN INDUSTRIAL DISTRICT,
799 Elm Street,
Winnetka, Illinois.

Gentlemen:

With reference to the sale by you to us of property situated in the City of Syracuse, New York, including the building known as the Chimes Building, and the assignment by you to us of all rents due and to become due for the use and occupancy of said property, including all sums found to be due from the United States of America, resulting from the condemnation by the United States of America of a portion of said real property, which condemnation is now pending in the United States District Court for the Northern District of New York as Civil Action No. 66-CV-483, we understand and agree that such assignment does not include any claims, rights or damages which you may have against the United States of America or any of its sub-divisions or bureaus for compensation in lieu of restoration and rehabilitation which may

Appendix J. Letter of September, 1967 from City Investing Company to SEID giving restoration award to SEID.

be due to you, as Landlord, with respect to the Chimes Building, in accordance with the provisions of the lease dated December 3, 1946 between Onondaga Holding Corp. and The United States of America and any extensions thereof or agreements supplemental thereto.

We further understand and agree that such assignment does not include any claims, rights or damages which you may have for compensation, award, or settlement from the United States of America or any of its subdivisions of bureaus for loss of equity which you may have sustained resulting from any wrongful or arbitrary use of the power of condemnation.

Said claims, rights or damages for compensation in lieu or restoration or rehabilitation and for loss of equity are reserved to you and are distinguished from any right to compensation payable by the United States of America as rent for the use and occupancy of the Chimes Building, pursuant to its condemnation proceeding, designated as Civil Action No. 66-CV-483.

Very truly yours,

CITY INVESTING COMPANY,
HOWARD F. NOONAN,
Howard F. Noonan.

Appendix K. Mortgage Modification Agreement between Equitable and Salina Onondaga Company Investors Diversified Funding 1968

THIS AGREEMENT, made as of the 30th day of July, 1968, between THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New York corporation having its principal office at 1285 Avenue of the Americas, Borough of Manhattan, City and State of New York, Mortgagee and Party of the First Part, and SALINA ONONDAGA COMPANY, a New York Limited Partnership, having an office in care of Investors Funding Corporation of New York, 630 Fifth Avenue, New York, New York 10020

Party of the Second Part,

WHEREAS, THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES is the owner and holder of certain mortgage notes and mortgages which are set forth and described in a certain Consolidation and Spreader Agreement between THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES and WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIRO and ARTHUR A. BOGEAUS, co-partners doing business as SOUTHEASTERN INDUSTRIAL DISTRICT, which agreement is dated April 1, 1954 and recorded May 3, 1954 in the Onondaga County Clerk's Office in Liber 1643 of Mortgages at page 631&c., upon which there was due and owing the sum of ONE MILLION SIX HUNDRED FIFTY THOUSAND DOLLARS ($1,650,000.00); and

WHEREAS, there is presently due and owing upon said mortgage notes and mortgages, which have been consolidated into one mortgage, the sum of ONE MILLION SIXTY-SEVEN THOUSAND THREE HUNDRED NINETY and SEVENTY-FOUR/ONE HUNDREDTHS DOLLARS ($1,067,390.74), with interest thereon at the rate of six and

one-half percent (6½%) per annum from the 30th day of July, 1968, and that there are no offsets, set-offs, defenses or counter-claims against said Mortgage notes and mortgages and the monies due thereunder and that said mortgages, as consolidated and spread, are a first and valid lien upon the premises described therein; and

WHEREAS, the Party of the Second part has agreed to prepare plans and specifications for the rehabilitation of the building erected on said premises, and

WHEREAS, the Mortgagee, as a holder of said Mortgage Notes and Mortgages, and the Party of the Second Part have agreed to modify and extend the terms of said Mortgage Notes and Mortgages,

NOW, THEREFORE, in pursuance of said agreement and in consideration of the sum of ONE DOLLAR ($1.00) and other valuable consideration to each other in hand paid and to induce the mortgagee to modify and extend the terms of said Mortgage Notes and Mortgages, the parties mutually covenant and agree as follows:

That there is due and unpaid the sum of ONE MILLION SIXTY-SEVEN THOUSAND THREE HUNDRED NINETY and SEVENTY-FOUR/ONE HUNDREDTHS DOLLARS ($1,067,390.74), payable as follows:

(a) Interest only at the rate of six and one-half percent per annum, payable on September 1, 1968 and interest only on the first day of each month thereafter, until August 1, 1971, at which time the entire balance of principal and interest shall be due and payable.

(b) In the event of default in the payment of interest for a period of ten (10) days after the same become due, or in

default of any of the other terms, covenants and conditions to be performed by the mortgagor for a period of ten (10) days, the mortgagee may, at its option, declare the entire balance of principal due and payable.

(c) The mortgagor is given the right and privilege of paying the entire unpaid balance of principal and interest, at any time, prior to the due date, without premium, penalty or prepayment charge.

(d) In addition to the payments provided for herein, to more fully protect the security of the mortgage, the mortgagor shall pay to the mortgagee, to be held in escrow, on the first day of each month until said mortgage notes are paid, concurrently with each installment of interest, one-twelfth ($^1/_{12}$) of the annual real estate taxes, together with an adequate reserve as estimated by the mortgagee, plus any deficiency between the amount as estimated and the amount actually due, upon demand. Mortgagor to furnish the mortgagee with all such tax bills as soon as the same are available. Any excess in such escrow account will be retained by the mortgagee to be applied to future tax obligations until such mortgage notes and mortgages have been paid, at which time the same will be applied toward the reduction of the indebtedness or returned to the mortgagor. At the option of the mortgagor, in lieu of such escrow, the mortgagor may guarantee payment, in writing, of such taxes.

(e) Mortgagor to pay for all the mortgagee's expenses in connection with the preparation of this agreement and for the recording thereof and such fees as a title insurance company will charge to endorse the existing title policy to insure the continued validity and priority of the mortgagee's interest in said premises.

(f) The mortgagor to furnish the mortgagee with a proposal, including plans and specifications for the rehabilitation of the Chimes Building, referred to in Paragraph "3." of an agreement between the mortgagor and City Investing Company, dated May 8, 1968. Approval by the mortgagee of such plans and specifications is not required.

(g) This Modification and Extension Agreement is in lieu of all prior agreements relative to the extension of the maturity of the mortgage notes and mortgages referred to herein and is for the benefit of INVESTORS FUNDING CORPORATION OF NEW YORK, or its wholly owned corporate subsidiary or a limited partnership, the general partner of which will be a wholly owned corporate subsidiary of INVESTORS FUNDING CORPORATION OF NEW YORK. This agreement may not be assigned without the consent of EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, except as provided for herein.

(h) There is no personal liability to be imposed upon the mortgagor or the purchaser, as provided for herein, for the repayment of the monies due pursuant to said mortgage notes and mortgages.

(i) That the aforesaid mortgage notes and mortgages are a valid subsisting obligation upon the premises described in such mortgages, and as such, are a first lien, as consolidated, upon the premises described therein.

(j) Except as herein modified and extended, the terms, covenants and conditions of such mortgages as consolidated, shall remain in full force and effect.

Appendix L. 1970 Modification agreement between Equitable and Salina Onondaga Company (Investors Diversified Funding).

IN WITNESS WHEREOF this agreement has been duly executed by the parties hereto the day and year first above written.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
By: R. T. Kist,
Second Vice President.

SALINA ONONDAGA COMPANY,
a New York Limited Partnership,
(Seal) By: IFC Syndicate Corporation,
general partner,
By: James Dauhi,
Pres. (Title).

Appendix L. 1970 Modification agreement between Equitable and Salina Onondaga Company (Investors Diversified Funding)

THIS INDENTURE, made the 12th day of March, 1970, between THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New York corporation having its principal office at 1285 Avenue of the Americas, New York, New York, party of the first part, and SALINA ONONDAGA COMPANY, a New York limited partnership having an office c/o Investors Funding Corporation of New York, 630 Fifth Avenue, New York, New York, party of the second part,

Appendix L. 1970 Modification agreement between Equitable and Salina Onondaga Company (Investors Diversified Funding).

WHEREAS, the party of the first part is the holder of the following mortgages and of the bonds or notes secured thereby recorded in the Onondaga County Clerk's office covering certain lands and tenements, of which the lands hereinafter described are part:

Mortgage dated March 20, 1928 made by James H. Heffernan and Blanche O. Heffernan to The Syracuse Trust Company in the principal sum of $600,000 recorded on March 20, 1928 in Book of Mortgages 725, page 129;

Mortgage dated August 22, 1929 made by Hub City Realty Corporation to Metropolitan Life Insurance Company in the principal sum of $1,200,000 recorded on August 31, 1929 in Book of Mortgages 750, page 461;

and which two mortgages above mentioned were consolidated by agreement dated December 26, 1947 made between The Equitable Life Assurance Society of the United States and Onondaga Holding Corporation and recorded on January 3, 1948 in Book of Mortgages 1310, page 633;

Mortgage dated April 1, 1954 made by Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow and Arthur A. Bogeaus, co-partners doing business as Southeastern Industrial District to The Equitable Life Assurance Society of the United States in the principal sum of $284,625 recorded on April 21, 1954 in Book of Mortgages 1642, page 221

and which 3 mortgages above mentioned were consolidated by agreement made between The Equitable Life Assurance Society of the United States and Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow and Arthur A. Bogeaus, co-partners doing business as Southeastern Industrial District into one mortgage in the amount of $1,650,000, dated April 1,

Appendix L. 1970 Modification agreement between Equitable and Salina Onondaga Company (Investors Diversified Funding).

1954 and recorded on May 3, 1954 in Book of Mortgages 1643, page 631;

AND WHEREAS, the party of the first part, at the request of the party of the second part has agreed to give up and surrender the lands hereinafter described unto the party of the second part, and to hold and retain the residue of the mortgaged lands as security for the money remaining due on said consolidated mortgage,

NOW THIS INDENTURE WITNESSETH, that the party of the first part, in pursuance of said agreement and in consideration of One ($1.00) Dollar, lawful money of the United States, paid by the party of the second part, does grant, release and quitclaim unto the party of the second part, all that part of said mortgaged lands situate in the City of Syracuse, County of Onondaga, State of New York and more particularly described in Schedule A and as outlined in red in Schedule B, both attached hereto and made a part hereof.

TOGETHER with all right, title and interest, if any, of the party of the first part of, in and to any streets and roads abutting the above described premises to the center lines thereof and in and to any fixtures and articles of personal property which are now contained in said premises and which may be covered by said mortgage.

TOGETHER with the hereditaments and appurtenances thereunto belonging, and all the right, title and interest of the party of the first part, of, in and to the same, to the intent that the lands hereby released may be discharged from said consolidated mortgage, and that the rest of the lands in said consolidated mortgage specified may remain to the party of the first part as heretofore.

Appendix L. 1970 Modification agreement between Equitable and Salina Onondaga Company (Investors Diversified Funding).

TO HAVE AND TO HOLD the lands and premises hereby released and quitclaimed to the party of the second part, and to the heirs, successors and assigns of the party of the second part forever, free, clear and discharged of and from all lien and claim under and by virtue of said consolidated mortgage aforesaid.

IN WITNESS WHEREOF, the party of the first part has executed this release the day and year first above written.

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
By: Donald R. Waugh Jr.,
(Seal) *Vice President.*

State of New York,
County of New York. } ss.:

On the 12th day of March, 1970, before me personally came Donald R. Waugh Jr. to me known, who, being by me duly sworn, did depose and say that he resides at 329 Cherry Lane, Westbury, N. Y. that he is the Vice President of The Equitable Life Assurance Society of the United States, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

JOHN T. QUARTUCCIO,
(Seal) *Notary Public,*
State of New York,
Qualified in Kings Co. No. 248464650,
Commission Expires March 30, 1970.

SCHEDULE A.

All that tract or parcel of land situate in the City of Syracuse, County of Onondaga, and State of New York, being a portion of Block No. 120 in said City and being more particularly described as follows: BEGINNING at the intersection of the southerly line of property now or formerly owned by the EL-ROH CORPORATION and the present easterly line of South Clinton Street, said point of intersection being S 17° 31′ 00″ E, a distance of 86.04 feet from the intersection of said present easterly line of South Clinton Street with the present southerly line of West Onondaga Street; thence N 72° 28′ 00″ E, along a line parallel to the northerly line of West Adams Street, said line also being said southerly line of the EL-ROH CORPORATION property, a distance of 14.0 feet to a point; thence S 17° 31′ 00″ E, along a line parallel to said present easterly line of South Clinton Street and 14.0 feet easterly therefrom measured at right angles thereto, a distance of 57.62 feet to its intersection with the northerly line of property now or formerly owned by the No. 560 South Salina Street Corporation; thence S 72° 28′ 00″ W, along a line parallel to said northerly line of West Adams Street, said line also being said northerly line of the No. 560 South Salina Street Corporation, a distance of 14.0 feet to its intersection with said present easterly line of South Clinton Street; thence N 17° 31′ 00″ W, along said present easterly line of South Clinton Street, a distance of 57.62 feet to the place of beginning. Containing 806.68 square feet of land.

Together with an easement of an unrestricted right of way over and along the alley or strip of land described as follows: BEGINNING at a point in the east line of South Clinton

Street distant 86.04 feet southerly measured along the east line of South Clinton Street from its intersection with the existing southerly line of West Onondaga Street;
Thence North 72° 28′ East 14 feet;
Thence North 17° 31′ West 12 feet to the North line of said right of way;
Thence South 72° 28′ West 14 feet to a point in said line of South Clinton Street;
Thence South 17° 31′ East 12 feet to the place of beginning.

ONONDAGA COUNTY CLERKS OFFICE
Release Mortgage Recorded, on the
11 day of December 1970 at
9:58 A.M. in Book 2436 Page 25&c
and examined. (Seal)

CALVIN D. HAMILTON,
Clerk.

(Book 725 page 129&c)
(Book 750 page 461&c)
(Book 1642 page 221&c)

Appendix M. 1971 Modification agreement between Equitable and Salina Onondaga Company (Investors Diversified Funding)

THIS AGREEMENT, made this 10th day of August 1971, between THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New York corporation having its principal office at 1285 Avenue of the Americas, Borough of Manhattan, City and State of New York, Mortgagee and Party of the First Part, and

SALINA ONONDAGA COMPANY, a New York Limited Partnership having an office in care of Investors Funding Corporation of New York, 630 Fifth Avenue, New York, New York 10020, Party of the Second Part,

WHEREAS, THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES is the owner and holder of certain Mortgage Notes and Mortgages which are set forth and described in a certain Consolidation and Spreader Agreement between THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES and WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW and ARTHUR A. BOGEAUS, co-partners doing business as SOUTHEASTERN INDUSTRIAL DISTRICT, which agreement is dated April 1, 1954, and recorded May 3, 1954, in the Onondaga County Clerk's Office in Liber 1643 of Mortgages at page 631 &c., upon which there was due and owing the sum of ONE MILLION SIX HUNDRED FIFTY THOUSAND DOLLARS ($1,650,000.00); and

WHEREAS, there is presently due and owing upon said Mortgage Notes and Mortgages, which have been consolidated into one mortgage, the sum of ONE MILLION SIXTY-SEVEN THOUSAND THREE HUNDRED NINETY and SEVENTY-FOUR/ONE HUNDREDTHS DOLLARS ($1,067,390.74), with interest thereon at the rate of six and one-half percent (6-1/2%) per annum from the 1st day of

Appendix M. 1971 Modification agreement between Equitable and Salina Onondaga Company (Investors Diversified Funding).

August, 1971, and that there are no offsets, set-offs, defenses or counter-claims against said Mortgage Notes and Mortgages and the monies due thereunder and that said Mortgages, as consolidated and spread, are a first and valid lien upon the premises described therein; and

WHEREAS, the Party of the Second Part has prepared Plans and Specifications for the rehabilitation of the building erected upon said premises, and most of said work has been completed, and

WHEREAS, the Mortgagee, as a holder of said Mortgage Notes and Mortgages, and the Party of the Second Part have agreed to modify and extend the terms of said Mortgage Notes and Mortgages,

NOW, THEREFORE, in pursuance of said agreement and in consideration of the sum of ONE DOLLAR ($1.00) and other valuable consideration to each other in hand paid and to induce the Mortgagee to modify and extend the terms of said Mortgage Notes and Mortgages, the parties mutually covenant and agree as follows:

That there is due and unpaid the sum of ONE MILLION SIXTY-SEVEN THOUSAND THREE HUNDRED NINETY and SEVENTY-FOUR/ONE HUNDREDTHS DOLLARS ($1,067,390.74), payable as follows:

(a) Interest only at the rate of eight and one-half percent (8 1/2%) per annum, payable on September 1, 1971, and interest only on the first day of each month thereafter, until August 1, 1972, at which time the entire balance of principal and interest shall be due and payable.

(b) In the event of default in the payment of interest for a period of ten (10) days after the same become due, or in

default of any of the other terms, covenants and conditions to be performed by the Mortgagor for a period of ten (10) days, the Mortgagee may, at its option, declare the entire balance of principal due and payable.

(c) The Mortgagor is given the right and privilege of paying the entire unpaid balance of principal and interest, at any time, prior to the due date, without premium, penalty or prepayment charge.

(d) In addition to the payments provided for herein, to more fully protect the security of the Mortgage, the Mortgagor shall pay to the Mortgagee, to be held in escrow, on the first day of each month until said Mortgage Notes are paid, concurrently with each installment of interest, one-twelfth (1/12) of the annual real estate taxes, together with an adequate reserve as estimated by the Mortgagee, plus any deficiency between the amount as estimated and the amount actually due, upon demand. Mortgagor to furnish the Mortgagee with all such tax bills as soon as the same are available. Any excess in such escrow account will be retained by the Mortgagee to be applied to future tax obligations until such Mortgage Notes and Mortgages have been paid, at which time the same will be applied toward the reduction of the indebtedness or returned to the Mortgagor. At the option of the Mortgagor, in lieu of such escrow, the Mortgagor may guarantee payment, in writing, of such taxes.

(e) Mortgagor to pay for all the Mortgagee's expenses in connection with the preparation of this Agreement and for the recording thereof and such fees as a title insurance company will charge to endorse the existing title policy to insure the continued validity and priority of the Mortgagee's interest in said premises.

(f) The Mortgagor shall complete the rehabilitation of said structure according to the Plans and Specifications previously submitted to the Mortgagee.

(g) The Parties hereto certify that this instrument secures the same indebtedness secured by the said Bonds or Notes and Mortgages hereinabove mentioned in secures no further or other indebtedness or obligation.

(h) That if at any time in the United States of America, or any other governmental agency, shall require revenue stamps to be affixed, or a tax to be paid for the Notes or this Agreement, the Mortgagor will pay the same with any interest or penalties imposed in connection therewith.

(i) This Modification and Extension Agreement is in lieu of all prior agreements relative to the extension of the maturity of the Mortgage Notes or Bonds and Mortgages referred to herein and is for the benefit of the fee owner of said premises which is SALINA ONONDAGA COMPANY, a New York limited partnership of which I F C SYNDICATE CORPORATION is a general partner, and one of the considerations for this Extension Agreement is the furnishing of a guaranty of the real estate taxes by INVESTORS FUNDING CORPORATION OF NEW YORK, which is to be signed and delivered simultaneously herewith.

(j) This Agreement may not be assigned without the written consent of EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, except as provided for herein.

(k) There is no personal liability to be imposed upon the Mortgagor, or the Party of the Second Part, or the purchaser, as provided for herein, for the repayment of the monies due pursuant to said Mortgage Notes and Mortgages.

Appendix M. 1971 Modification agreement between Equitable and Salina Onondaga Company (Investors Diversified Funding).

(l) That the aforesaid Mortgage Notes and Mortgages are a valid subsisting obligation upon the premises described in such Mortgages, and as such are a first lien, as consolidated, upon the premises described therein.

(m) Except as herein modified and extended, the terms, covenants and conditions of such Mortgages as consolidated, shall remain in full force and effect.

IN WITNESS WHEREOF this Agreement has been duly executed by the parties hereto the day and year first above written.

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
By JAMES E. HAYES,
(Seal) James E. Hayes, Second Vice President.

SALINA ONONDAGA COMPANY,
a New York
Limited Partnership by,
I F C SYNDICATE CORPORATION,
General Partner,
By JEROME DANSKER,
(Seal) Jerome Dansker, President.

State of New York
County of New York } ss.:

On the 13th day of August, 1971, before me personally came James E. Hayes, to me known, who, being by me duly sworn, did depose and say that he resides at 62 Parkwoods

Appendix M. 1971 Modification agreement between Equitable and Salina Onondaga Company (Investors Diversified Funding).

Road, Manhasset, New York, that he is the Second Vice President of THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

JOHN R. BECK,
Notary Public, State of New York,
Qualified in Nassau Co.
No. 30,0209310,
Cert. Filed in New York County
Clerk Office,
(Seal) Commission Expires March 30, 1973.

State of New York
County of New York } ss.:

On the 10th day of August, 1971, before me personally came Jerome Dansker, to me known, who, being by me duly sworn, did depose and say that he resides at 25 East 86th Street, New York, New York, that he is the President of I F C SYNDICATE CORPORATION, the corporation described in and which executed the foregoing instrument: that he knows the seal of said corporation: that the seal affixed to said instrument is such corporate seal: that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order, as and for the act and deed of SALINA ONONDAGA COMPANY, a Limited Part-

nership of which the aforesaid corporation is a general partner.

ARNOLD M. JACOBS,
Notary Public, State of New York,
No. 24-7057168,
Qualified in Kings County,
Certificate filed in New York County,
(Seal) Commission Expires March 30, 1972

Record and Return to:
Monroe Abstract & Title Corp.
333 East Onondaga Street
Syracuse, New York 13202

Appendix N. 1973 Equitable and Salina Onondaga Company (Investors Diversified Funding) modification agreement

Book 2518 Page 611

MODIFICATION AND EXTENSION AGREEMENT

This Agreement, made the 19th day of November, 1973, between THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES ("Equitable"), a New York corporation having its principal office at 1285 Avenue of the Americas, New York, New York, Mortgagee and party of the First Part, and

SALINA ONONDAGA COMPANY ("Company"), a New York Limited Partnership having an office in care of In-

vestors Funding Corporation of New York, 630 Fifth Avenue, New York, New York 10020, Party of the Second Part.

WHEREAS, Equitable is the owner and holder of certain Mortgage Notes and Mortgages which are set forth and described in a certain Consolidation and Spreader Agreement between Equitable and WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW and ARTHUR A. BOGEAUS, co-partners doing business as Southeastern Industrial District which Agreement is dated April 1, 1954 and recorded May 3, 1954 in the Onondaga County Clerk's Office in Liber 1643 of Mortgages at page 631 *et seq.* upon which there was due and owing the sum of $1,650,000; and

WHEREAS, there is presently due and owing upon said Mortgage Notes and Mortgages, as consolidated, the sum of $1,067,390.74, with interest thereon at the rate of 8½% per annum from the 1st day of November, 1973 and that there are no offsets, set-offs, defenses or counterclaims against said Mortgage Notes and Mortgages as consolidated and that the said mortgages as consolidated and spread are a first and valid lien on the premises described therein; and

WHEREAS, Equitable and the Company heretofore modified and extended the terms of payment of the aforesaid Mortgage Notes and Mortgages, as consolidated, by an instrument dated August 10, 1971 and recorded in the Onondaga County Clerk's Office on August 19, 1971 in Book 2450, Page 35 *et seq.*, and

WHEREAS, the Company has requested Equitable to defer payment of the said Mortgage Notes as hereinafter set forth and Equitable has agreed thereto,

Appendix N. 1973 Equitable and Salina Onondaga Company (Investors Diversified Funding) modification agreement.

NOW, THEREFORE, in pursuance of the said agreement and in consideration of the sum of One Dollar ($1.00) and other valuable consideration paid by Company to Equitable to induce Equitable to modify and extend the terms of said Mortgage Notes and Mortgages, as heretofore consolidated, modified and extended, the parties covenant and agree as follows:

That there is due and unpaid on the said Mortgage Notes the principal sum of One Million Sixty Seven Thousand Three Hundred Ninety Dollars and Seventy Four Cents ($1,067,390.74).

The Company covenants and agrees to pay the said principal sum together with interest thereon as hereinafter set forth, except as hereinafter provided:

Interest only at a rate equal to 3½% above the prime rate of Chase Manhattan Bank, N.A., New York, New York, but not less than 10% per annum, from November 1, 1973. Such rate is to be computed and adjusted independently for each installment based upon the prime rate in force as of the close of business on the first banking day of the period with respect to which such installment is being calculated. The term "prime rate" shall mean the lowest rate of interest on which the said Chase Manhattan Bank or its successors will make a loan of $1,000,000 or more on an unsecured basis to its large commercial or industrial customers with the highest credit standing. Such interest is to be paid commencing December 1, 1973 and on the first day of each successive calendar month thereafter until November 1, 1975 when the entire unpaid principal balance together with any unpaid interest thereon is to be paid.

Appendix N. 1973 Equitable and Salina Onondaga Company (Investors Diversified Funding) modification agreement.

In the event of default in the payment of interest for a period of 30 days after the same becomes due, or in default of any of the other terms, covenants and conditions to be performed by the Mortgagor in accordance with the terms of the aforesaid Mortgages as consolidated, spread, heretofore and as herein modified, the Mortgagee may, at its option, declare the entire unpaid balance of principal and interest due and payable.

The Mortgagor is given the right and privilege of paying the entire unpaid balance of principal and interest, at any time, prior to the due date, without premium, penalty or prepayment charge.

In addition to the payments provided for herein, to more fully protect the security of the Mortgage, the Mortgagor shall pay to the Mortgagee, to be held in escrow, on the first day of each month until said Mortgage Notes are paid, concurrently with each installment of interest, one-twelfth (1/12) of the annual real estate taxes, together with an adequate reserve as estimated by the Mortgagee, plus any deficiency between the amount as estimated and the amount actually due, upon demand. Mortgagor to furnish the Mortgagee with all such tax bills as soon as the same are available. Any excess in such escrow account will be retained by the Mortgagee to be applied to future tax obligations until such Mortgage Notes and Mortgages have been paid, at which time the same will be applied toward the reduction of the indebtedness or returned to the Mortgagor. At the option of the Mortgagor in lieu of such escrow, the Mortgagor may guarantee payment, in writing, of such taxes.

Mortgagor is to pay for all the Mortgagee's expenses in connection with the preparation of this Agreement and for the

recording thereof and such fees as a title insurance company will charge to endorse the existing title policy to insure the continued validity and priority of the Mortgagee's interest in said premises.

The Parties hereto certify that this instrument secures the same indebtedness secured by the said Bonds or Notes and Mortgages hereinabove mentioned and secures no further or other indebtedness or obligation.

That if at any time the United States of America, or any other governmental agency, shall require revenue stamps to be affixed, or a tax to be paid for the Notes on this Agreement, the Mortgagor will pay the same with any interest or penalties imposed in connection therewith.

This Modification and Extension Agreement is in lieu of all prior agreements relative to the extension of the maturity of the Mortgage Notes or Bonds and Mortgages referred to herein and is for the benefit of the fee owner of said premises which is SALINA ONONDAGA COMPANY, a New York limited partnership of which I F C SYNDICATE CORPORATION is a general partner, and one of the considerations for this Extension Agreement is the furnishing of a guaranty of the real estate taxes by INVESTORS FUNDING CORPORATION OF NEW YORK, which is to be signed and delivered simultaneously herewith.

This Agreement may not be assigned without the written consent of EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, except as provided for herein.

There is no personal liability to be imposed upon the Mortgagor, the Party of the Second Part, as provided for herein, for the repayment of the monies due pursuant to said Mortgage Notes and mortgages.

That the aforesaid Mortgage Notes and Mortgages are a valid subsisting obligation upon the premises described in such Mortgages, and as such are a first lien, as consolidated, upon the premises described therein.

Except as herein modified and extended, the terms, covenants and conditions of such Mortgages as consolidated, shall remain in full force and effect.

IN WITNESS WHEREOF this Agreement has been duly executed by the parties hereto the day and year first above written.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
By JAMES E. HAYES, Vice President.

SALINA ONONDAGA COMPANY, a New York Limited Partnership By,

I F C SYNDICATE CORPORATION,
General Partner,
By NORMAN DANSKER,
(Seal) Norman Dansker, Vice-President.

State of New York
County of New York } ss.:

On the 4th day of December, 1973, before me personally came James E. Hayes, to me known, who, being by me duly sworn, did depose and say that he resides at 62 Parkwoods Road, Manhasset, New York, that he is the Vice President of THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, the corporation described in and which

executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

JOHN T. QUARTUCCIO,
Qualified in Kings Co.
No. 24-8464650,
Notary Public State of New York,
(Seal) Commission Expires March 30, 1974.

State of New York
County of New York } ss.:

On the 19th day of November, 1973, before me personally came Norman Dansker, to me known, who, being by me duly sworn, did depose and say that he resides at 132 East 72nd Street, New York, N. Y. 10021, that he is the Vice-President of I F C SYNDICATE CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows of the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order, as and for the act and deed of SALINA ONONDAGA COMPANY, a Limited Partnership, of which the aforesaid corporation is a general partner.

MURRAY P. LENNARD,
Notary Public of New York,
No. 31-2606950. Qual. in N.Y. Co.,
Commission Expires March 30, 1975.

ONONDAGA COUNTY CLERKS OFFICE
Mortgage Recorded on the
24 day of Jan. 1974 at
3:16 PM in Book, 2516 Page 611 & c
and examined.
Calvin D. Hamilton, Clerk

Recorded January 24, 1974—3:16 P.M.
xd Julia D. Kreffer.

State of New York
County of Onondaga } ss.:

1. JAMES D. GORHAM, Clerk of the County of Onondaga of the County Court of said County and of the Supreme Court both being Courts of record having a common seal.

DO HEREBY CERTIFY that I have compared this copy with the original filed, recorded. Filed and Recorded. Filed and entered or entered in this office and that the same is a correct transcript thereof and of the whole of said original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said county and courts on.

JAMES D. GORHAM
(Seal) *Clerk*

Oct. 25, 1974

Appendix O. 1975 Summons in Mortgage Foreclosure by Equitable Omitting SEID as a Defendant

STATE OF NEW YORK
SUPREME COURT—County of Onondaga

—— —o——

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Plaintiff,

against

SALINA ONONDAGA COMPANY: CITY INVESTING COMPANY; THE CHASE MANHATTAN BANK for itself and as Agent for: Security National Bank, First National City Bank, First National Bank of Chicago, Barclays Bank of New York, Franklin National Bank, Isreal Discount Bank, Ltd., National Bank of North America, The Riggs National Bank of Washington, Sterling National Bank & Trust Company of New York, The Trust Company of New Jersey, Union Bank, Virginia National Bank, and Hambros Bank Limited; R. L. WOODCOCK & ASSOCIATES, INC.; E. F. THRESH, INC., and PEOPLE OF THE STATE OF NEW YORK,

Defendants.

———o———

Plaintiff designates Onondaga County as the place of trial.

The basis of the venue is situs of real property.

Plaintiff resides at 220 South Warren St. Syracuse, NY 13202.

County of Onondaga.

Appendix O. 1975 Summons in mortgage foreclosure by Equitable omitting SEID as a defendant.

To the above named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action ad to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorneys within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: January 30, 1975.

MELVIN AND MELVIN,
Attorneys for Plaintiff,
700 Merchants Bank Bldg.,
Syracuse, New York 13202,
Phone: (315) 422-1311.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1551

WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW, and ARTHUR A. BOGEAUS, Co-Partners, d/b/a SOUTHEASTERN INDUSTRIAL DEVELOPMENT DISTRICT, *Petitioners,*

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Respondent,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, RESPONDENT, IN OPPOSITION

GLASSIE, PEWETT, BEEBE & SHANKS,
HERSHEL SHANKS,
MICHAEL J. RUANE,
1819 H Street, N.W.,
Washington, D. C. 20006,
Attorneys for Respondent, Equitable Life Assurance Society of the United States.

Of Counsel:
JOHN F. NUGENT
ASSISTANT GENERAL COUNSEL
EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 1551

WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW, and ARTHUR A. BOGEAUS, Co-Partners, d/b/a SOUTHEASTERN INDUSTRIAL DEVELOPMENT DISTRICT, *Petitioners,*

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Respondent,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, RESPONDENT, IN OPPOSITION

OPINIONS BELOW

The opinion of the trial judge finding the United States liable (Pet. App. 1a-34a) is not reported. The Court of Claims decision affirming the Government's liability (Pet. App. 35a-36a) is reported at 204 Ct. Cl. 920 (1974).

The opinion of the Court of Claims holding that the award against the United States belongs to petitioners (Pet. App. 37a-48a) is not reported. The opinion of the Court of Claims on rehearing *en banc,* reversing the panel and holding that the award belongs to respondent Equitable (Pet. App. 53a-79a) is reported at 529 F.2d 1299 (1976).

JURISDICTION

The judgment of the panel of the Court of Claims was entered on May 14, 1975 (Pet. App. 37a). A petition for rehearing *en banc,* timely filed, was granted; and the judgment of the Court of Claims on rehearing was entered on January 28, 1976 (Pet. App. 53a). The petition for writ of certiorari was filed on April 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Did the Court of Claims have jurisdiction to decide whether the award against the Government belonged to petitioners, on the one hand, or to respondent Equitable, on the other. This respondent believes the answer should be "yes".

2. Does the Court of Claims decision *en banc* conflict with any New York state decision and, if so, is this conflict of such a nature that it should be resolved by this Court. This respondent believes the answer to both parts of this question should be "no".

STATUTE INVOLVED

The statute involved, 28 U.S.C. 1491, provides in pertinent part as follows:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

STATEMENT

Petitioners were the owners of a building in Syracuse, New York, known as the Chimes Building, which was leased to the United States (Pet. App. 13a). Respondent Equitable is the holder of a first deed of trust on the Chimes Building, which secures a debt in the original principal amount of $1,650,000.00 (Pet. App. 58a).

When the Government vacated the building at the termination of its lease, the damaged condition of the building gave rise to a claim against the Government which petitioners asserted in the Court of Claims (Pet. App. 1a). Respondent Equitable promptly intervened, alleging that any award belonged to it, by virtue of a specific provision in its deed of trust assigning to respondent Equitable all rights to the award (Pet. App. 54a).

A panel of the Court of Claims ruled that the award belonged to petitioners (Pet. App. 48a). On rehearing *en banc,* the full court reversed the panel and concluded that the award belonged to respondent Equitable (Pet. App. 73a).

On the merits, the case turns on the meaning of a specific provision in the deed of trust. Petitioners contend that the lower court's decision conflicts with applicable New York state decisions and that this conflict should be resolved by this Court. *In limine,* peti-

tioners contend that the Court of Claims had no jurisdiction to decide whether the award against the Government belonged to petitioners or respondent Equitable. Respondent Equitable rejects both of these contentions.

ARGUMENT

1. Although petitioners failed to raise the jurisdictional issue below, they now contend that *United States* v. *Sherwood,* 312 U.S. 584 (1941), requires dismissal of this suit for lack of jurisdiction. Petitioners reliance on *Sherwood* is misplaced.

Sherwood was a Tucker Act suit in the District Court in which a judgment-creditor sued both the judgment-debtor and the United States in the hope of reducing to judgment, the judgment-debtor's unliquidated claim against the Government. The judgment-creditor was in effect bringing a derivative action in the hope of realizing on the judgment-debtor's claim against the Government. The judgment-creditor (plaintiff) admittedly had no direct claim against the Government and could not sue the Government on its own behalf. Moreover, the judgment-debtor was admittedly a necessary party defendant. This Court quite properly ruled that the Tucker Act did not confer jurisdiction on the judgment-creditor's derivative claim against the Government.

The *Sherwood* case is obviously a far cry from the instant case where both respondent Equitable and petitioner contend that the award against the Government belongs to them. Petitioners have sued the Government; and respondent Equitable has sued the Government. The Court of Claims has ruled only as to whether the award against the Government belongs to

respondent Equitable or to petitioners. Clearly, the Tucker Act confers jurisdiction on each of these independent claims against the Government (even though one of the claims must necessarily be rejected). See the carefully reasoned opinion of Judge Davis in *Ralston Steel Corp.* v. *United States,* 340 F.2d 663 (Ct. Cl. 1965), *cert. denied,* 381 U.S. 950 (1965), in which he distinguishes *Sherwood* on the same ground as we have done above. See also *Hadden* v. *United States,* 132 F. Supp. 202 (Ct. Cl. 1955) and Chief Judge Cowan's decision in *Great American Insurance Company* v. *United States,* 397 F.2d 289 (Ct. Cl. 1968):

> . . . [T]his court has, without a single dissent in any case, uniformly held that, where the principal suit is on a claim to recover a contract balance held by the Government as a stakeholder, the court has jurisdiction to determine whether the plaintiff or a third party, who claims an interest in the stake, is entitled to recover the money from the United States. [397 F.2d at 292]

Even Judge Laramore who dissented in the *Great American Insurance Company* case, recognized that where the Government is a mere stakeholder, the Court of Claims has jurisdiction to decide which of two direct claimants is entitled to the award. Judge Laramore dissented on the ground that one of the parties there did not have a direct claim against the Government. In the instant case, however, the Government *is* a mere stakeholder; the Government concedes that it owes the amount of $292,574.26 either to petitioners or to respondent Equitable. The Government has taken no position as to who owns the award. With each of the parties making a direct claim against the Government, it is clear that the Court of Claims had jurisdiction to decide the validity of these claims.

2. Petitioners contend that the Court of Claims decision on the merits conflicts with a number of New York state decisions.[1] This claim is made with regard to several issues and with regard to several cases ruling on these issues. However, the fact of the matter is that none of these New York cases is more than tangentially relevant to the issues in this case. Indeed, some of the New York cases which petitioners contend conflict with the instant case are cited for the first time by petitioners in this Court, e.g., *Spencer* v. *Spencer,* 94 N.Y. 353 (1884) and *Merritt* v. *Bartholick,* 36 N.Y. 9 (1867). None of the cases which allegedly conflict with the instant case are even cited, let alone said to be dispositive, by Judge Nichols in his dissent to the *en banc* decision below.

The critical issue in this case is simply the meaning of a particular word, "award", contained in the applicable deed of trust. There is no New York case which comes even close to disposing of this issue. The kind of "conflict in principle" which petitioners allege is simply an effort to cast an issue which is of interest solely to the parties into a cert-worthy mold. That attempt must fail.

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[1] Petitioners also claim that the decision on the merits conflicts with two earlier decisions of the Court of Claims; Beaconwear Clothing Co. v. United States, 355 F.2d 583 (1966) and United Pacific Insurance Co. v. United States, 358 F.2d 966 (1966) (Pet. 14). However, this alleged conflict exists only in the minds of petitioners. Even Judge Nichols, who dissented from the *en banc* decision does not claim such a conflict. Indeed, he does not even cite the allegedly conflicting cases in his dissent. But, in any event, such a conflict would not be grounds for certiorari, especially when the latest decision is by the court sitting *en banc*. *See* Stern & Gressman, *Supreme Court Practice,* Sec. 4.6 (4th ed. 1969).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
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No. 75-1551

In the Supreme Court of the United States

OCTOBER TERM, 1975

WALTER J. SAMPSON, ET AL., PETITIONERS

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
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In the Supreme Court of the United States

OCTOBER TERM, 1975

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v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

On June 28, 1974, the Court of Claims entered judgment for petitioners and against the United States for $292,574.26 (204 Ct. Cl. 920; Pet. App. 35a-36a). The United States did not seek review of this judgment. Thereafter proceedings continued in the Court of Claims to determine whether the petitioners or respondent, The Equitable Life Assurance Society of the United States, were entitled to distribution of the proceeds of the judgment. As petitioners state (Pet. 8), the United States took no position on this question. On January 28, 1976, the Court of Claims entered judgment directing that the $292,574.26 awarded earlier be distributed to Equitable instead of to petitioners (Pet. App. 73a). No part of the judgment has yet been paid by the United States.

The United States continues to take no position regarding how the unpaid $292,574.26 judgment should be distributed.

ROBERT H. BORK,
Solitictor General.

MAY 1976.

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1551

WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW, and ARTHUR A. BOGEAUS, Co-Partners d/b/a SOUTHEASTERN INDUSTRIAL DEVELOPMENT DISTRICT,

Petitioners,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Respondent,

— *vs.* —

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Claims

REPLY MEMORANDUM ON BEHALF OF PETITIONERS

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IN THE

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Petitioners,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

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— vs. —

UNITED STATES OF AMERICA,

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On Petition For Writ Of Certiorari
To The United States Court of Claims

REPLY MEMORANDUM ON BEHALF OF PETITIONERS

REPLY ARGUMENT

1. Equitable maintains it has a direct relationship to the United States because it has made a claim against United States monies. Equitable however was not a direct party on the contract with the United States and its rights, if any, are derivative. Thus Equitable's defense set up in their answering memorandum falls.

Indeed, Equitable conceeds, as indeed it must, that under *United States* v. *Sherwood*, 312 U. S. 584 (1941), no action of

a private derivative nature may be brought in the United States Court of Claims against a private party or the United States. The pertinent language in *Sherwood* provides:

> "We think it plain that the present suit could not have been maintained in the Court of Claims because that court is without jurisdiction of any suit brought against private parties and because adjudication of the right or capacity of respondent to proceed with the suit upon the contract of the judgment debtor with the United States is prerequisite to any recovery upon the Government contract."

Under the above holding the test of whether a claim is within the jurisdiction of the court depends upon whether rights under private instruments have to be construed by the court to confer standing to sue. If such construction is involved, no jurisdiction obtains.

In the instant case, the rehearing panel themselves made a construction, over protest of SEID, of a private security mortgage instrument to which the United States was not a party, and under which the mortgagee asserted rights against the mortgagor.

The court stated at page 61a of the Petition:

> "We hold that Clause 20 in the 1954 consolidated mortgage assigned all awards made by anyone past, present or future with respect to the mortgaged property to Equitable as mortgagee as security for its mortgage debt and that the assignment included the restoration award of $292,574.26 involved in the present suit. Equitable is entitled to recover the award so that it can be applied upon the unpaid mortgage debt."

Obviously to reach the conclusion that Equitable had standing and was also entitled to the award the court had to have and

did initially construe a private credit mortgage agreement. This cannot be done under *Sherwood*.[1]

Merely labeling a claim direct or characterizing the government's position as a stakeholder does not change the clear applicability of the *Sherwood* prohibition.

In *Ralston Steel Corporation* v. *United States*, 340 F. 2d 663, 669 (Ct. Cl. 1965) cert. denied 381 U. S. 950 (1965) the Court of Claims recognized that it lacked jurisdiction over any claim which required a determination of the rights of private litigants among themselves. The court held that it did have jurisdiction in that case as the plaintiff's claim was founded on statutes and as the claim did not require "determination of the rights of private litigants among themselves." 340 F. 2d at 669.

Great American Insurance Company v. *United States*, 397 F. 2d 289 (Ct. Cl. 1968) and *Hadden* v. *United States*, 132 F. Supp. 202 (Ct. Cl. 1955) cited by respondent Equitable do not help Equitable overcome the hurdle of demonstrating that it has a direct claim. For as Equitable conceeds, in both cases the plaintiff and the intervenors each had a direct claim against the United States. And in neither was it necessary to construe a private agreement between the plaintiff and intervenor as a prerequisite to recovery against the United States.[2]

It follows the action of the Court of Claims in this case is at variance with the settled practice in that court both before *United States* v. *Sherwood* (See Court of Claims cases cited at

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1. Of course a mortgage debt is not owed by SID (See Petition page 14), and the whole question of marshalling of assets involved in the pending foreclosure proceedings to which SID was not a party was ignored (Petition page 15) as well as the bar of the New York six years Statute of Limitations. (See Petition page 14). Moreover, discharge Law was wrongly applied (See Petition page 13).

2. *Great American Insurance Company* v. *United States*, was decided under 41 U. S. C. Section 114 (b). As a procedural statute Section 114 (b) permits the court to obtain jurisdiction over third parties with a direct interest in the claim against the United States. But, as Section 114 (c) indicates, the subject matter jurisdiction of the court was not expanded to permit the court to determine rights under a private instrument among private litigants especially where that determination confers standing. See *Rolls-Royce Limited, Derby England* v. *United States*, 364 F. 2d 415, 418 (Ct. Cl. 1966).

page 10 of Petition), and after *Sherwood; United States* v. *Berkley*, 276 F. 2d 9, 149 Ct. Cl. 549 (1966).

CONCLUSION

The action of the Court of Claims in the case at bar is at variance not only with a previous decision of this court but with earlier decisions of the Court of Claims. It is urged that the court should act to insure the proper interpretation and application of *United States* v. *Sherwood* by the Court of Claims, and no other relief is available to the petitioner and its counsel.

Respectfully submitted,

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